IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The City of Lafayette, Louisiana and the City of Plaquemine, Louisiana (hereinafter "Cities") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 532 F. 2d 431. The opinion of the United States District Court for the Eastern District of Louisiana (Appendix B) is reported at 1975-1 CCH Trade Cases ¶ 60, 240.

JURISDICTION

The judgment of the court of appeals (Appendix C) was entered on May 27, 1976. On June 9, 1976 the Cities timely filed a petition for rehearing *en banc*. The court of appeals entered an order (Appendix D) denying the Cities' petition for rehearing on October 4, 1976. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Relying on this Court's decision in *Goldfarb* v. *Virginia State Bar, infra,* the court of appeals ruled that actions of the Cities, political subdivisions of the State of Louisiana, might constitute violations of the antitrust laws (15 U.S.C. § 1 *et. seq.*). The question presented is whether such city governments are subject to causes of action and treble damage liability under the federal antitrust laws.

STATUTES INVOLVED

The case concerns the intended scope of federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 and Section 3 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 14. (These statutory provisions are set forth in Appendix E).

STATEMENT OF THE CASE

This petition arises from the district court's dismissal of an amended counterclaim filed by the respondent Louisiana Power & Light Company (hereinafter "LP&L") in *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power &*

Light Company et al. Civil Action No. 73-1970, Section E (E.D. La.), an action filed by the Cities on July 24, 1973. The Cities' complaint alleges that LP&L combined and conspired with other privately owned utilities to restrain and monopolize interstate commerce in the generation, transmission and sale of electric power and energy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Although two of the original defendants have settled and been dismissed from the action, the case remains pending in the district court against LP&L and its parent corporation Middle South Utilities, Inc.

LP&L's counterclaim alleges that the Cities have violated the federal antitrust laws in the operation of their municipal electric utility systems.[1] Four independent allegations were contained in the amended counterclaim: that the Cities engaged in sham and frivolous litigation against LP&L before several federal regulatory agencies, the United States Department of Justice and the federal courts in connection with LP&L's planned construction of a nuclear elec-

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[1] The Cities as political subdivisions of the State of Louisiana are empowered by the Constitution of the State of Louisiana to exercise any governmental power not inconsistent with the state constitution and not denied by their charters or by general law. *See,* Article VI, Section 7(a) of the Constitution of the State of Louisiana. (*See also,* Article XIV, Section 40(a) of the constitution in effect prior to January 1, 1975.) Further, Louisiana statute provides that cities may "acquire by condemnation or otherwise, construct, own, lease and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities." Louisiana Acts 1918, No. 160, § 3 (LSA-RS 33:621) *See also,* LSA-RS 33:4163. These constitutional and statutory provisions are set forth in Appendix F.

tric generating facility;[2] that the Cities each included in their municipal utility bonds covenants with the bondholders to exclude competition from other utilities in the provision of electric power and energy within their municipal boundaries; that the Cities had agreed with others for the provision of electric power and energy in their market areas for a term longer than that lawful under state law in an attempt to exclude competition in such markets; and that the City of Plaquemine contracted with certain customers to provide water and gas service on the condition that such customers also purchase electricity from the City. The counterclaim alleged that LP&L's damages resulting from the Cities' conduct were in excess of $180 million.

On March 3, 1975 the district court dismissed LP&L's amended counterclaim. Relying principally upon this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), and the Fifth Circuit's decision in *Saenz* v. *University Interscholastic League*, 487 F. 2d 1026 (5th Cir. 1973), the district court ruled that the Cities engaging in "purely state government activities are not subject to the requirements of the antitrust laws of the United States." (Appendix B at p. 13a). Final judgment on LP&L's amended counterclaim was entered pursuant to Rule 54(b), Fed. R. Civ. P., on March 13, 1975, and an appeal was taken by LP&L to the Fifth Circuit.

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[2] The so-called sham litigation referred to in this charge includes the proceedings which resulted in this Court's decision in *Gulf State Utilities Co.* v. *FPC*, 411 U.S. 747 (1973), as well as a proceeding in the then Atomic Energy Commission in which the Justice Department and the Cities as intervenors charged LP&L, in connection with its nuclear license application, with activities inconsistent with the antitrust laws, as provided for in Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135.

In an opinion dated May 27, 1976, the Fifth Circuit, relying upon its interpretation of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), held "that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws." (Appendix A at p. 8a). Without recognition of the critical legal and factual distinctions between this case and *Goldfarb*, the court found that the *Goldfarb* decision controlled the question of the application of the federal antitrust laws to the actions of the Cities. It ruled that for state governmental bodies to avoid antitrust liability it must be shown that the state legislature in granting authority to the governmental bodies specifically contemplated the alleged anticompetitive restraint and that "the challenged activity was clearly within the legislative intent." (Appendix A at p. 5a). On June 9, 1976 the Cities filed a petition for rehearing *en banc*, arguing that the court of appeals had misapprehended the *Goldfarb* decision, and later brought to the Court's attention the July 6, 1976 decision in *Cantor* v. *Detroit Edison Co.*, —— U.S. ——, 96 S. Ct. 3110, which the Cities felt relevant to the deliberations of the court of appeals. On October 4, 1976 the court of appeals denied the Cities' petition for rehearing without comment.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Decision Misapplies *Goldfarb* and Conflicts with the Ninth Circuit's Decision in *New Mexico*.

The question before this Court is the intended scope of the federal antitrust laws—specifically whether Congress intended these laws to apply to the actions of

state governmental units.[3] Contrary to the implications of the three decisions of this Court which relate to the question, *Parker* v. *Brown*, 317 U.S. 341 (1943); *Goldfarb* v. *Virginia State Bar, supra*; and *Cantor* v. *Detroit Edison Co., supra*, the Fifth Circuit has ruled that the actions of cities may violate the federal antitrust laws and that such local political units of state government may be subject to treble damage liability in suits brought by private corporations. This ruling by the Fifth Circuit is in conflict with the decisions of another circuit court[4] and language in its own recent decision *Litton Systems, Inc.* v. *Southwestern Bell Telephone Co.*, 539 F. 2d 418, 422 n. 8 (5th Cir. 1976).

While the *Goldfarb* and *Cantor* decisions have provided clarification of the *Parker* v. *Brown* doctrine in cases where private parties are sued, *Goldfarb* has since been interpreted so as to create a split between the circuit courts on the question of the applicability of the federal antitrust laws to city governments. Until the conflict is resolved by this Court, the interim effect and uncertainty created by the Fifth Circuit's decision on the conduct of state and local government will be profound. The question and the conflict among the circuit courts presented by this case are, therefore, in urgent need of resolution. The related question of the

[3] The issue here is not one of the Sherman Act superseding or preempting the acts of state governmental bodies, but whether state bodies are subject to prosecution for violation of the federal law.

[4] In *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974), the court held that the federal antitrust laws were not intended to apply to the activities of the states or their cities and counties. On the other hand the Third Circuit, like the Fifth, has recently relied upon *Goldfarb* to rule that municipal corporations are subject to this body of federal law. *Duke & Co., Inc.* v. *Foerster*, 521 F. 2d 1277 (3rd Cir. 1975).

applicability of the antitrust laws to the judicial branch of state government is before the Court this term in *Bates* v. *State Bar of Arizona*, No. 76-316, *prob. juris. noted*, October 4, 1976. The Cities suggest that by hearing their case as well as *Bates* the Court will have the opportunity to respond to the questions left unanswered by *Goldfarb* and *Cantor* and resolve the conflict between the circuit courts on the question of applying the federal antitrust laws to state bodies.

In *Parker* v. *Brown, supra*, this Court held that, in passing the Sherman Act, Congress did not intend to include "state action or official action directed by a state" within the Act's prohibitions. 317 U.S. at 351. The Court stated further that:

> There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. (citations omitted) 317 U.S. at 351.

Since the *Parker* v. *Brown* decision, several of the circuit courts have also held the Sherman Act to be inapplicable to the actions of subordinate state governmental bodies.[5] In this case, however, the Fifth Circuit

[5] *See, e.g. Saenz* v. *University Interscholastic League, supra*, (bureau of the state university administering a slide rule contest); *New Mexico* v. *American Petrofina, Inc., supra*, (cities and counties purchasing asphalt); *Howard* v. *State Department of Highways of Colorado*, 478 F. 2d 581 (10th Cir. 1973) (state agency restricting highway advertising); *Padgett* v. *Louisville and Jefferson County*

took the position that this Court's intervening *Goldfarb* decision required a contrary conclusion.

In *Goldfarb,* this Court was called upon to decide when a private party could find shelter under the state action doctrine. That case involved an antitrust challenge to a minimum fee schedule established by a county bar association. Also named as a defendant was the Virginia State Bar. The Court rejected the State Bar's attempt to avail itself of state action protection because it found this organization of private attorneys although "a state agency for some limited purposes . . . has voluntarily joined in what is essentially a private anti-competitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." 421 U.S. at 791-92. With respect to the anticompetitive conduct alleged in *Goldfarb,* the Virginia State Bar was acting not as an agent of the State but in the pecuniary interests of its private members. Mr. Justice Stewart in his dissent in *Cantor, supra,* confirms that *Goldfarb* involved private not public conduct. Reviewing the decision, Mr. Justice Stewart states that "*Goldfarb* clarified *Parker* by holding that *private* conduct, if it is to come within the state-action exemption, must be not merely 'prompted' but 'compelled' by state action." —— U.S. ——, 96 S. Ct. at 3139 (emphasis added); *see also, Id.* at 3132-33.

However, in its decision in this case the Fifth Court misapprehended *Goldfarb* by viewing the challenged

Air Board, 492 F. 2d 1258 (6th Cir. 1974) (joint county agency contracting for taxi services at an airport); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District,* 433 F. 2d 131 (8th Cir. 1970) (bi-state agency operating a public bus system); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F. 2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966) (state agency contracting for airport services).

activities of the Virginia State Bar as activities of a "state agency," (Appendix A at p. 3a), which like the Cities, is a "governmental entity," (Appendix A at p. 4a n. 5). The distinction between the essentially private acts for private gain in *Goldfarb* and the direct acts of city government in providing municipal services involved in the instant case was ignored by the court below when it read *Goldfarb* to "require" its holding that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." (Appendix A at p. 4a). The Cities agree that *Goldfarb* has made it more difficult for private parties to seek protection under the shield of state action. However, the Cities contend that the *Goldfarb* decision did not purport to rule on the question which was before the Fifth Circuit and is presented here, and that *Goldfarb* does not support application of the federal antitrust laws to the direct activities of state governmental units.[8]

Cantor, like *Goldfarb,* concerned an antitrust attack on private action. The defendant, The Detroit Edison Company, argued unsuccessfully that its acts had been approved by an agency of the state and were, therefore, beyond the reach of the federal antitrust laws. Although the several opinions differed as to the proper scope of the *Parker* v. *Brown* doctrine when applied to private conduct endorsed to some degree by state action, they agreed that the Sherman Act does not apply

[8] The United States also takes the position that *Goldfarb* involved "a private body . . . comprised of persons having a direct financial interest in the subject matter of the anticompetitive restraint", and distinguishes *Goldfarb* from a situation where an agency of state government is itself charged with violations of the federal antitrust laws. Brief for the United States as Amicus Curiae at 18, *Bates* v. *State Bar of Arizona, supra.*

to the activities of the state. In this respect, the opinions in *Cantor* support the Cities' contention that the Fifth Circuit has erred in its ruling in this case.[7]

Commentators, like the members of this Court in *Cantor,* have disagreed over the precise scope of the *Parker* v. *Brown* doctrine, but it seems that they do agree that *Parker* v. *Brown* provides shelter "where the defendants are either the state, one of its subdivisions, or state officials acting under the color of state authority or sovereignty." *Handler, The Current Attack on the Parker* v. *Brown State Action Doctrine,* 76 Colum. L. Rev. 1, 8-9 (1976). *Accord, Parker* v. *Brown—The Great Bicentennial Celebration,* Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, United States Department of Justice before the Council of the ABA Public Utility Law

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[7] Although the dicta in the *Cantor* opinions speak to the question of the applicability of the federal antitrust laws to the activities of the states and their officials (*see,* plurality opinion, 96 S. Ct. at 3117, 3122; Burger, C.J., concurring, *Id.* at 3123; Blackmun, J., concurring, *Id.,* at 3128 n. 5; Stewart, J., dissenting, *Id.* at 3131-32, 3139-40) and not specifically to their political subdivisions, policy considerations would not favor such a distinction between the state and the subordinate entities of the government to which the state delegates its power and authority. The Sherman Act itself provides no basis for such a distinction. Moreover, the language of *Goldfarb,* speaking in terms of actions of the state "as sovereign," 421 U.S. at 791, does not provide a basis for treating the Cities differently than the state. It is axiomatic that municipalities are "instrumentalities of the state for the convenient administration of government within their [illegible] *State of Louisiana* v. *City of New Orleans,* 109 U.S. 285, 287 [illegible] and accordingly "their powers are such as belong to sovereignty" *Klein* v. *New Orleans,* 99 U.S. 149, 150 (1878). Municipalities, indeed, "exercise locally . . . the sovereign power of" the state. *Breard* v. *City of Alexandria, La.,* 341 U.S. 622, 640 (1951). *Accord., Vilas* v. *Manila,* 220 U.S. 345, 356 (1911).

Section, White Sulphur Springs, West Virginia (October 28, 1976).

Failure to recognize the important distinction between private and public action is, therefore, the genesis of the Fifth Circuit's improper analysis and erroneous conclusion as to the applicability of the federal antitrust laws to the Cities. Likewise, it provides the basis for the specific legislative mandate standard which the court below would, inappropriately, impose on remand. It is reasonable and logical, because there is no question that private parties are subject to the federal antitrust laws, that specific direction by state law should be required in order to insulate such private interests from prosecution under those statutes. However, where it has been held that the antitrust laws do not apply to the actions of the states, reason and logic dictate that, when a political subdivision of state government is charged, the inquiry of the court need not proceed beyond a determination that the body is indeed a political subdivision of the state.

This approach was adopted in *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363 (9th Cir. 1974), the court of appeals decision most directly on point and most directly in conflict with the Fifth Circuit's ruling in this case. In *New Mexico* the court affirmed the dismissal of an antitrust counterclaim directed at the state and various of its cities and counties. The Ninth Circuit, noting the *Parker* v. *Brown* analysis and that the Sherman Act is a criminal statute, rejected the argument that the state's immunity extends only to cases in which the legislature had mandated the conduct in question. The court recognized that such a test would be proper where private interests sought to

avoid antitrust penalties by "masquerading under the banner of 'state action' ", 501 F. 2d at 369, but held that "when there is no doubt that the defendant is the state [or a political subdivision of the state], the 'legislative mandate' analysis is unnecessary." 501 F. 2d at 370 & n. 15. The *New Mexico* court also concluded that the nature of the alleged anticompetitive action was not determinative, stating that "[t]he basis (grounded in federalism) for our conclusion that Congress did not intend the Sherman Act to apply to the states does not vary in strength depending on the specific activity in which the state engages." *Id.* at 371-72.

New Mexico is not in conflict with *Goldfarb* as suggested by the Fifth Circuit in this case. (Appendix A at p. 5a n. 8). The *New Mexico* court recognized that the legislative mandate test later set forth in *Goldfarb* should apply where private parties, such as the Virginia State Bar, are involved, but not where actual state governmental bodies are the alleged violators. The Cities submit that the *New Mexico* ruling is not diminished by *Goldfarb* and that a conflict among the circuits exists on the issue of the applicability of the federal antitrust laws to the activities of state political subdivisions.

Not only do the circuit courts disagree on the question of the applicability of the federal antitrust laws to activities of state governmental units, but also there is now an apparent difference of opinion as between panels of the Fifth Circuit itself.[8] The ruling in *New*

[8] On September 23, 1976, some four months after the ruling in the instant case and eleven days before the court summarily denied the Cities petition for an *en banc* rehearing, Judge Wisdom delivered an opinion in *Litton Systems Inc.* v. *Southwestern Bell*

Mexico and the language of the Fifth Circuit in *Litton* are irreconcilable with the ruling in this case, and dramatically illustrate the necessity for guidance and direction by this Court. The Cities here, and state and local governmental bodies across this nation, should be told whether or not the antitrust laws apply to them. Only this Court can alleviate the confusion.

2. The Fifth Circuit Decision Will Disrupt Essential Operations of City Government.

The importance of the issue in this case to state and local government cannot be gainsaid. Not only do state governmental entities operate electric utilities, they also run hospitals and public transportation systems. Municipalities collect garbage, provide water and gas, and offer educational services. Through zoning and other local ordinances municipal governments restrict the location of private businesses, and grant franchises and concessions of many kinds. Examples are numerous of state and local governmental action which if conducted by private persons or corporations might violate antitrust standards. This is true because the functions of local government often include exercise of "monopoly" power within local areas. Indeed, the exercise of such power is the essence of government itself.

Telephone Co., supra, interpreting *Goldfarb* and *Cantor* as they applied to a private party seeking protection from an antitrust attack on its marketing practices. In his opinion Judge Wisdom correctly noted that this Court had narrowed the state action doctrine as it applies to private parties, but in footnote 8 of his opinion approves the proposition that the Sherman Act does not apply to state action "where the defendant is a state or *division of a state*" 539 F. 2d at 422 (emphasis added).

Subjecting local governmental units to federal antitrust liability will necessarily stifle what has heretofore been considered proper governmental activity. The threat of both injunctions and treble damage liability will hang heavily over every locally elected official and the consequences of the Fifth Circuit's ruling will most certainly have a chilling effect upon local government. LP&L's counterclaim alleges single damages of $180 million. In oral argument before the court of appeals counsel for LP&L announced that the estimate of alleged damages had by that time been revised upwards to $500 million. Thus, the Cities' exposure after trebling could exceed $1.5 billion, an enormous bill for a few thousand taxpayers to meet. The threat of large damage claims against municipal governments is not an imaginary horrible. Elected officials contemplating a course of civic action may be unwilling to accept the economic and political risks created by the Fifth Circuit's decision.

The uncertainty resulting from the ruling of the court below is intensified by the unworkable standard which the decision imposes. First, liability would turn on the ability of the governmental entity to demonstrate in some way that the state legislature had contemplated the alleged anticompetitive conduct. The almost total lack of published legislative histories available at the state level may make this task impossible. The federal courts will be forced to second guess the purposes of state legislatures with little or no guidance from any quarter and create unnecessary interference in the administration of state and local government. Second, state legislatures give general, not specific, operating authority to their subordinate agencies. This practice is founded on sound public policy. Such legislation must necessarily be general to provide those who execute and administer it the essential flexibility to meet a variety of situations, foreseen and unforeseen. The test enunciated by the Fifth Circuit will place an unworkable burden on legislatures to predict specific acts and responses under the statutes and presciently provide for all of them in the very same statutes. Under such circumstances few cities can act with confidence in carrying out the functions of government.

Unlike private persons, political bodies are, by definition, charged with acting in the public interest. They are managed by elected officials responsible to the populace for their actions and subject to removal from office should the discharge of their duties not conform to the will and expectations of the electorate. Properly, abuses of public power by state and local officials have in most instances under our federal system been a matter for remedy by local law, state and local political action and actions for redress of violations of constitutional rights and limitations. (*See, e.g.*, Blackmun, J. concurrng in *Cantor*, 96 S.Ct. at 3127.) The federal antitrust laws with their provisions for criminal sanctions and treble damage liability have no place in this scheme and should not be applied to interfere with the public actions of locally elected officials in the discharge of their official functions.

The federal antitrust laws were enacted to protect the public from abuses of private economic power. *Parker* v. *Brown, supra,* at 351; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 492-493 (1940). There is no evidence that Congress intended locally elected officials or the governmental bodies they serve to be subject to prosecution under the federal antitrust laws. Without

a clear indication of such an intent, application of these laws to local governmental action defeats the principles of our federalist system.[9] The Fifth Circuit's decision in this case is a misinterpretation of the scope of the federal antitrust laws and of this Court's prior decisions. Correction of this error should not wait until the first American city is bankrupted by a treble damage judgment or subjected to an injunction which interferes with the provision of governmental services.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] The integrality of the *Parker* v. *Brown* doctrine to constitutional federalism is persuasively argued by Professor Handler in his article, *The Current Attack on the Parker* v. *Brown Doctrine, supra.*

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER & LIGHT COMPANY,
Defendant and Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(MAY 27, 1976)

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

TJOFLAT, *Circuit Judge.*

The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws. Answering in the negative, we reverse the decision below and remand for further proceedings.

I

A complaint filed on July 24, 1973, by the cities of Lafayette and Plaquemine, Louisiana (the Cities), alleged that appellant Louisiant Power & Light Company (Power & Light) and three other privately owned utilities had violated Sections 1 and 2 of the Sherman Act.[1] The allegations of this complaint are not involved in the present appeal. In its amended counterclaim, Power & Light charged the Cities with having themselves violated the federal anti-

[1] 15 U.S.C. Sections 1, 2.

trust laws in several respects. These allegations can be summarized as follows: (a) that the Cities were conducting sham litigation in order to delay or prevent Power & Light's construction of a nuclear power plant; (b) that anticompetitive covenants were included in the Cities' debentures;[2] (c) that the Cities had conspired with other parties to extend the provision of power to certain service areas beyond the time periods allowed by state law; (d) that the city of Plaquemine was requiring customers outside its city limits to purchase electricity from the city in order to obtain gas and water. All of these actions were alleged to violate Sections 1 and 2 of the Sherman Act. The "tie-in" of electricity to gas and water was alleged to violate Section 3 of the Clayton Act,[3] as well. In its order of February 28, 1975, the trial court dismissed the entire counterclaim. While noting its reluctance to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the court held that the plaintiffs' status as cities was sufficient to bring all their conduct within the "state action" exemption as annnounced in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and as interpreted by this Court in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). Following the entry of final judgment dismissing Power & Light's counterclaim on March 13, 1975, this appeal was taken.

II

In *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Supreme

[2] These covenants were described as "covenants to exclude all competition in the provision of electric power and energy within [the plaintiffs'] municipal boundaries." Trial Record, at p. 14. The specific nature of the alleged covenants cannot be determined from the record before this Court.

[3] 15 U.S.C. Section 14.

Court has defined the extent to which state governmental entities are exempt from the antitrust laws. The earlier case was a suit to enjoin the enforcement of an agricultural marketing program which had been established by a California statute. Noting that the program "derived its authority and its efficacy from the legislative command of the state . . . ", 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 326, the Court held that the defendants' conduct was beyond the reach of the Sherman Act.[4] The Court could "find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.* at 350, 51, 63 S.Ct. at 313, 87 L.Ed. at 326. By legislative command, the state had adopted an anticompetitive program and prescribed the terms of its operation. Violations were punishable under the state's penal code. In the Court's view, a restraint which the state, "as sovereign, imposed . . . as an act of government . . . ", could not be made the basis for Sherman Act liability. *Id.* 317 U.S. at 352, 63 S.Ct. at 314, 87 L.Ed. at 327.

The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the "state action" doctrine. In *Goldfarb*, *supra*, the High Court was faced with a Sherman Act challenge to minimum fee schedules published by a county bar association and enforced by the Virginia State Bar. The state bar was a state agency by law, *id.* 421 U.S. at 789-90, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 586-587, and both lower courts in *Goldfarb* had held that the bar qualified for the "state action" exemption.[5] Without dissent,

[4] The Court was willing to assume that the alleged activities would be illegal if carried out by private persons. 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 325.

[5] In contrast to the state bar, the county bar was a private association which was not a state agency by statute and which received no active state supervision. The district court, 355 F.Supp. 491

the Supreme Court rejected this contention. Although the state legislature had authorized the Supreme Court of Virginia to regulate the practice of law, *id.*, at 788, 95 S.Ct. at 2014, 44 L.Ed.2d at 585, that court had taken no action to fix lawyers' fees, *id.* 421 U.S. at 789, 95 S.Ct. at 2014, 44 L.Ed.2d at 586. Nor was there any state statute which directed members of the bar to establish minimum fee schedules. Therefore, the state bar's participation in price fixing failed to satisfy the "threshold inquiry" under *Parker*, i.e., "whether the activity is required by the State acting as sovereign," *id.* at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

Taken together, these two controlling precedents require the following analysis. A subordinate state governmental body [6] is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether

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(E.D.Va. 1973), held that the county bar was subject to the antitrust laws. The Court of Appeals, 497 F.2d 1 (4th Cir. 1974), agreed that the county bar was not covered by the "state action" exemption. However, its activities were seen as falling within a "learned profession" exemption to the Sherman Act, and as having an insufficient impact upon interstate commerce. Since the county bar, unlike the state bar in *Goldfarb*, and unlike the Cities in the present case, was not a governmental entity, the Supreme Court's disposition of its contentions will not be discussed here.

[6] Plaintiffs would have us equate cities and states for purposes of determining "state action". No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs. See *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim. Thus, for example, cities, counties, and other state political subdivisions are not considered "the state" for purposes of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 667 n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Fay* v. *Fitzgerald*, 478 F.2d 181, 184 n. 3 (2d Cir. 1973); *Markham* v. *City of Newport News*, 292 F.2d 711, 716-17 (4th Cir. 1961).

the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.[7] Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.[8] A district judge's inquiry on this point should

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[7] The opinion in *Goldfarb* does not support defendant's claim that every alleged anticompetitive activity must be specifically approved by the legislature. Thus, the *Goldfarb* Court would apparently have found an exemption if the Supreme Court of Virginia, acting within the intended scope of its legislative grant, had established minimum fees. See 421 U.S. at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. See also note 8, *infra*.

[8] Our resolution of these general issues is in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster*, *supra*, 521 F.2d at 1279-80. We have carefully studied the authorities cited by plaintiffs and have found nothing that directly contradicts the position which we take in this case. Unlike *Duke & Co.* and the present case, none of these decisions dealt with municipalities. Almost all of them are pre-*Goldfarb*. To the extent that *State of New Mexico* v. *American Petrofina*, 501 F.2d 363 (9th Cir. 1974) might be read as extending the "state action" exemption to lower governmental bodies' activities which were not contemplated by the legislature, we must regard it as in conflict with the Supreme Court's later decision in *Goldfarb*.

Brief mention should be made of plaintiffs' argument that a decision such as this will lead to undesirable variations in the application of the antitrust laws, since the governmental activities sub-

be broad enough to include all evidence which might show the scope of legislative intent.[9]

III

The Cities argue that a decision adverse to them would necessarily overrule this Court's prior opinion in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). We are reminded of the general rule that one panel cannot overrule the holding of a previous panel of the same court. See *United States* v. *Automobile Club Ins. Co.*, 522 F.2d 1, 3 (5th Cir. 1975). However, we do not regard our decision as irreconcilably inconsistent with that in *Saenz*. The complaint in that case alleged that the director of a state slide rule contest induced a state agency to

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ject to the *Parker-Goldfarb* exemption will differ from state to state. We regard this as an inevitable result of the emphasis in *Parker* and *Goldfarb* upon the scope of legislative intent. For instance, the *Goldfarb* Court made it clear that a statute specifically establishing minimum fee schedules would lead to a "state action" umbrella. 421 U.S. at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587. Such an emphasis upon what state laws provide will necessarily lead to variations, dependent upon the differing will of state legislatures.

Plaintiffs also draw our attention to the dicta in *Goldfarb* which suggest that the Supreme Court of Virginia could, without new statutory authority, impose minimum fee schedules by means of court rules. *Id.* at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. Our reading of *Goldfarb* is that such rule-making would lead to a "state action" exemption only if the state court's rules fell within the intended scope of its legislative authority "to regulate the practice of law", *id.* 421 U.S. at 788, 95 S.Ct. at 2014, 44 L.Ed. at 586.

As a final point, we cannot accept defendant's invitation to import the discredited proprietary-governmental distinction into this area of the law. This contention is unsupported by authority and is irrelevant under *Parker* and *Goldfarb*, which look only to the scope of the legislative action and not the "proprietary" or "governmental" nature of the subordinate governmental body's conduct.

[9] Therefore, we reject the capricious limitation suggested by counsel at oral argument, which would restrict a court's inquiry to the pertinent statutes themselves.

define its regulations so as to exclude the plaintiff's slide rules from use in the contest. This action allegedly resulted from an unspecified economic tie between the director and a slide rule manufacturer which competed with plaintiff. As the panel noted, *id.* at 1028, the charge of an economic relationship between the director and the rival manufacturer was entitled to no weight, since plaintiff could not simply rely on his pleadings in the face of opposing affidavits. Stripped of the unsupported charge of financial influence, the allegations in *Saenz* must be seen as having stated no more than that (a) the director, "clearly acting within the scope of his duties," *id.* at 1028, determined that plaintiff's slide rule was not a "standard slide rule" which could be employed in the contest, and (b) the agency ratified that decision. It can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university system (of which the agency was a part) by the Texas legislature. The *Parker-Goldfarb* principle, as we have interpreted it, would clearly exempt such actions from the Sherman Act. We are, therefore, unpersuaded that there is any necessary conflict between our decision and the panel opinion in *Saenz*.

Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis* v. *Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*. The test now is whether the challenged action is the type of activity which the legislature intended the governmental body to perform. This principle has already been tacitly recognized by one post-*Goldfarb* panel of this Court. Faced with an antitrust challenge

to a city council's rate-making practices, the panel in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) was not content merely to note that the actor was a municipal body. Rather, the Court went on to ascertain that the state legislature had expressly delegated ratemaking authority to municipalities, *id.* at 1133. The legislature had also specifically charged municipalities with the duty of insuring a fair rate structure. The *Jeffrey* panel was unwilling to assume that the city council was doing anything other than carrying out this legislatively mandated duty when it took the actions complained of. *Id.* It will be observed that this is precisely the type of inquiry which our reading of *Goldfarb* and *Parker* would require. In our view, *Jeffrey* at least implicitly adopted the analysis which we have expressly employed today. The *Jeffrey* opinion, then, lends further support to our conclusion that, in the wake of *Goldfarb*, plaintiffs' interpretation of *Saenz* cannot be considered the law of this circuit.[10]

IV

To summarize, we conclude that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws. Upon remand, the court must determine whether the activities alleged fall within the intended scope of the powers granted to the Cities by the legislature. In their briefs on appeal, the Cities have provided copies of statutes which allegedly comprehend the acts involved in Power & Light's counterclaim. These are materials which should be submitted to the trial court in the first instance, together with all other relevant evidence.

REVERSED and REMANDED, with directions.

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[10] We are also unpersuaded by plaintiffs' reliance upon *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968). The various exemptions perceived by the *Alabama Power* panel were expressly derived from a judicial construction of the Rural Electrification Act in an antitrust context. No such problem of reconciling various federal statutes with one another is presented in the current appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 73-1970

SECTION "E"

Minute Entry
February 28, 1975
Cassibry, J.

CITY OF LAFAYETTE, LOUISIANA ET AL

Versus

LOUISIANA POWER & LIGHT COMPANY, ET AL

(FILED MARCH 3, 1975)

Order

IT IS THE ORDER OF THE COURT that the motion of LP&L to amend its' counterclaim be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to dismiss the entire counterclaim, as amended, be, and the same is hereby GRANTED.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate determination of this litigation. 28 U.S.C. § 1292(b).

REASONS

This action by the Cities of Lafayette and Plaquemine, Louisiana, alleges antitrust violations on the part of

Louisiana Power & Light Co., a Louisiana public utility (hereinafter LP&L), and others; plaintiffs seek injunctive relief and treble damages.

LP&L answered the suit and also filed a counterclaim, in which it alleged antitrust violations on the part of the plaintiff cities. Plaintiffs submitted an answer to the counterclaim denying all allegations. LP&L then filed a motion to amend its counterclaim and this motion was granted without opposition.

Subsequently, LP&L filed a new motion to amend its counterclaim, to include in it, allegations of Sherman and Clayton Act violations by plaintiffs in connection with certain tie-in arrangements. Specifically, LP&L claims that the City of Plaquemine has adopted a practice of offering residents outside of their municipal limits, such services as water, gas and sewerage, but only on the condition that they take electric service from the city and not from another supplier, *i.e.*, LP&L.

On September 13, 1974, this court denied LP&L's motion to amend its counterclaim holding that the antitrust laws of the United States do not apply to activities which are purely those of the state or its instrumentalities.

LP&L thereafter, filed a motion for reconsideration of this order. Simultaneously, the plaintiffs filed a motion to dismiss the original counterclaim. It is agreed among the parties that if the amended counterclaim is improper then the original counterclaim must fail for the same reason.

The sole issue therefore, is whether the antitrust laws of the United States are applicable to activities of a state or its municipalities.

Plaintiffs contend that the doctrine of nonapplicability of the antitrust laws to the states is a longstanding and well established rule. Once it is determined that the activities are those of the state no further inquiry is appropriate

because the antitrust laws do not apply. See *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974).

LP&L disagrees, and contends that the proper analysis of antitrust allegations against a state or its instrumentalities is a two step process. First, the court examines whether state activity is involved and secondly, the court decides whether the state is acting in a governmental capacity. Unless *both* steps are satisfied the state's actions can and should be answerable under the antitrust laws. In essence LP&L argues that if the state's activity is proprietary in nature then the antitrust laws *do* apply.

The inapplicability of the antitrust laws to the states was first enumerated in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Supreme Court noted that:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.
>
> . . .
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. 317 U.S. at 351-52.

Subsequent cases have adopted as the rule of the *Parker* Case that the antitrust laws do not apply to state governmental actions, including those delegated to an agency or municipality of the State. *See Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (5th Cir. 1974).

However, other cases treat *Parker* in a less expansive way, permitting a court to examine the type or extent of state activity involved. *See Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *George R. Whitten Jr., Inc.* v. *Paddock Pool*

Buildings Inc., 424 F.2d 25 (1st Cir. 1970). However, these cases generally involve state action, in concert with private enterprise, thereby distinguishing them from the instant case.

The Fifth Circuit Court of Appeals in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) has recently addressed itself to the question. The decision in that case clearly holds that state governmental entities are "outside the ambit of the Sherman Act. 487 F.2d at 1028.

In *Saenz*, a slide rule manufacturer brought a treble damage action alleging that the defendants had violated Section 1 of the Sherman Act by conspiring to effect the rejection of plaintiff's product for use in interscholastic competition among Texas public schools. The defendants included the University Interscholastic League (UIL), its director, Lenhart, and L. R. Ridgway Enterprises, Inc., a competitor of the plaintiff's, whose product was ultimately selected for use in the competition. UIL and Lenhart filed motions to dismiss the complaint on the grounds that as a state agency and state official, they were not answerable under the Sherman Act. The district court granted defendants' motions and the Fifth Circuit affirmed. The Court of Appeals concluded:

> . . . the League is a governmental entity exempt from the Sherman Act.
>
> As this Court has previously said, '. . . it is settled that neither the Sherman Act or the Clayton Act was intended to authorize restraint of governmental action.' *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968).

The language of the *Saenz* case is clear, however, its applicability to this case is less certain. *Saenz* involves a state instrumentality, namely the UIL, acting in a capacity and

in an area that is generally considered to be exclusively state governmental activity, i.e., education of its citizens. The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity: activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States.

In order to clarify the record, and place the issue in the most favorable posture for appeal, it shall be the order of the court that LP&L's motion to amend its counterclaim be granted and the entire counterclaim, as amended, be dismissed.

/s/ FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

Worth Rowly, Esq.
George Spiegel, Esq.
Robert E. Winn, Esq.
Tom F. Phillips, Esq.
Denis McInerney, Esq.
Andrew P. Carter, Esq.
William O. Bonin, Esq.
Walter E. Workman, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

D. C. Docket No. CA-73-1970 "E"

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Defendant and Appellant.*

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1976

Issued as Mandate: Oct. 18, 1976

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 4, 1976

TO ALL COUNSEL OF RECORD

No. 75-1909—City of Lafayette, LA and City of Plaquemine, LA v. Louisiana Power & Light Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, CLERK
/s/ By SUSAN M. GRAVES, DEPUTY CLERK

/smg

cc: Mr. Andrew P. Carter
Mr. Tom F. Phillips
Mr. Jerome A. Hochberg
Mr. Robert C. McDiarmid
Mr. Robert E. Winn

APPENDIX E

Sherman Act

SEC. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SEC. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act

SEC. 3

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

APPENDIX F

Louisiana Constitution of 1974 (Effective January 1, 1975)

ARTICLE VI. LOCAL GOVERNMENT

PART I. GENERAL PROVISIONS

Section 7. Powers of Other Local Governmental Subdivisions.

Section 7. (A) Powers and Functions. Subject to and not inconsistent with this constitution, the governing authority of a local governmental subdivision which has no home rule charter or plan of government may exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by its charter or by general law, if a majority of the electors voting in an election held for that purpose vote in favor of the proposition that the governing authority may exercise such general powers. Otherwise, the local governmental subdivision shall have the powers authorized by this constitution or by law.

Louisiana Constitution of 1921 (as amended)

ARTICLE XIV. PAROCHIAL-MUNICIPAL AFFAIRS

SECTION 40. MUNICIPALITIES; CHARTERS AND POWERS; HOME RULE

(d) The provisions of this constitution and of any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith. Subject to the foregoing restrictions every municipality shall have, in addition to the powers expressly conferred upon it, the additional right and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary or proper in the

legitimate exercise of its corporate powers and municipal functions.

Louisiana Statutes Annotated (LSA)

R.S. 33:621

The inhabitants of the city shall continue a body politic and corporate by its present name and, as such, shall have perpetual succession; may use a corporate seal which it may alter at will; may sue and be sued; may acquire property in perfect ownership or lesser interest by purchase, donation, appropriation, lease, or lease with the privilege to purchase for any municipal purpose, and may also acquire all excess over that needed for all such purposes, and sell or lease such excess with proper restrictions in order to protect and preserve the improvement; may sell, lease, hold, manage and control such property, and make any and all rules and regulations, by ordinance or resolution, which may be required to carry out fully the provisions of any conveyance, or will, in relation to any gift or bequest or the provision of any lease by which it may acquire property; may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities; may assess, levy, and collect taxes for general and special purposes; may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt, on the security of the municipality, or of any improvement or excess property thereof; may appropriate money out of the city treasury for all lawful purposes; may create, provide for, construct, and maintain all things of the nature of public works and improvements; may grant franchises and licenses and fix the terms and regulate the exercise thereof, and no waiver or forfeiture of the power to regulate publicly operated public utilities, may be effected; may levy and collect assessments for local improve-

ments; may define, regulate, prohibit, abate, suppress, or prevent all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the inhabitants of the city, and all nuisances and causes thereof; may regulate and control the use, for whatever purpose, of the streets or other public places; may create, establish, abolish, and organize offices, and fix the salaries and compensations of all officers and employees except as provided in any applicable civil service laws; may make and enforce local police, sanitary and other regulations; and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city and for the performance of the functions thereof. The city shall have all the powers that are granted to the existing municipality by general or special laws; and all such powers, whether express or implied, shall be exercised and enforced in the manner prescribed by this Part, or when not prescribed herein, in such manner as shall be provided by ordinance or resolutions of the commission.

R.S. 33:4163

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 22, 1976
CERTIORARI GRANTED MARCH 28, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*

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LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

No. 73-1970 Section "E"

CITY OF LAFAYETTE, LOUISIANA AND CITY OF
PLAQUEMINE, LOUISIANA

v.

LOUISIANA POWER & LIGHT COMPANY,
MIDDLE SOUTH UTILITIES, INC.,
CENTRAL LOUISIANA ELECTRIC COMPANY, and
GULF STATES UTILITIES COMPANY.

Docket Entries

Date	Proceedings
7/24/73	Complaint (3) summs & (1) long arm issued
12/ 3/73	Deft. Louisiana Power & Light *Answer*
1/17/74	Pltf's reply to counterclaim of Louisiana Power & Light Co.
1/18/74	Deft. Louisiana Power & Light Co. mtn for leave to amend & suppl. answer & counterclaim in antitrust action, hrg. set for 1/30/74
1/30/74	HRG. on mtn by Louisiana Power & Light Co. for leave to amend, counsel for deft. requested that this mtn be striken from the docket of 1/30/74 (U.S. Mag. HL) ent 1/30/74
2/11/74	Pltf's reply to amended counterclaim of Louisiana Power & Light Co.
2/13/74	ME. & ORDER that deft Louisiana Power mtn for leave to amend etc. is GRANTED U.S. Mag. HL ent 2/13/74
7/23/74	Mtn by deft Louisiana Power & Light for leave to amend & suppl. answer and counterclaim in antitrust action, hrg. set for 9/11/74

Date	Proceedings
9/11/74	HRG. on mtn by La. Power & Light Co. for leave to amend and supl answer and counter-claim in antitrust action SUBMITTED
9/13/74	ME & ORDER that the mtn by Louisiana Power & Light Co. for leave to amend & suppl answer & Counter-Claim in antitrust action be DENIED (FJC) ent 9/13/74
10/ 1/74	Mtn of Louisiana Power & Light Co. for reconsideration, or in the Alternative amendment of Order, hrg. set for 11/20/74
11/ 6/74	Mtn & Order that mtn set for 11/20/74 is continued to 12/4/74 (FJC) ent 11/7/74
11/12/74	Pltf's mtn to dismiss Louisiana Power & Light Co.'s, hrg. set for 12/4/74
12/ 4/74	HRG. on mtn Matter *SUBMITTED*
1/ 6/75	Transcript of proceedings in open court taken on 12/4/75
3/ 3/75	ME & ORDER that Pltf's mtn to dismiss counterclaim is GRANTED and mtn of LP&L is GRANTED. (see record for reasons) (FJC) 3/3/75
3/13/75	ORDER for final judgment that counter-claim of deft LP&L against Cities of Lafayette is dismissed. (FJC) 3/13/75
3/31/75	NOTICE OF APPEAL
3/31/75	BOND FOR COST OF APPEAL
4/11/75	Deft.'s Mtn & Order Retention of Record pending appeal. 4/8/75 FJC
4/11/75	Deft.'s Designation of Record for Appeal

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1905

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA

v.

LOUISIANA POWER & LIGHT COMPANY

Docket Entries

Date	Proceedings
4/15/75	Dup. Notice of Appeal and Clerks Statement of Docket Entries
5/ 7/75	Partial Record or Cert. List
5/13/75	Flg. joint motion for fixing dates for filing briefs (GRANTED—BWS)
7/24/75	Appendix
7/24/75	Brief for Appellant LP&L
9/ 9/75	Brief for Appellee
9/11/75	Addition to Appellees' Brief
9/29/75	Flg appellant's (LP&L) motion for summary disposition by reversal, and, in alternative, for expedited consideration with reply brief and brief in support
10/ 1/75	Reply Brief for Appellant
10/ 6/75	Flg. appellees' opposition to LP&L's motion for summary disposition by reversal
10/30/75	Flg. order DENYING motion of appellant, Louisiana Power and Light Co. for summary reversal; further order DENYING motion for expedited consideration. (HT-LRM-PHR)

Date	Proceedings
12/29/75	Case assigned for 2/11/76
2/11/76	Hearing Panel: LRM-CC-GBT
5/27/76	Opinion Rendered—GBT Reversed & Remd.
6/ 9/76	Appellees Petition for Rehearing En Banc
6/ 9/76	Bill of Costs
6/28/76	Flg. Appellees' letter dtd. 6/25/76 with copy of Sup. Ct.'s decision attached. (CE)
7/19/76	Flg appellees' supplement to pet. for reh. en banc. (T) (J)
10/ 4/76	Order denying Rehearing (en banc)
10/12/76	Flg. Motion by Appellant for Stay of Mandate
10/13/76	Response to motion to stay mandate filed by Appellant
10/18/76	Flg. order DENYING motion to stay mandate (GBT)
10/18/76	Jdgt. as Mdt. Issd. to clerk
11/ 1/76	Partial Rec. Ret. to Clerk
12/29/76	Notice of Flg. of Cert. Pet. on 12/22/76
4/ 4/77	Order of S.C. Granted 3/28/77

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs*

v.

LOUISIANA POWER & LIGHT COMPANY, MIDDLE SOUTH UTILITIES, INC., CENTRAL LOUISIANA ELECTRIC COMPANY, and GULF STATES UTILITIES COMPANY, *Defendants.*

(Filed July 24, 1973)

No. 73-1970

Plaintiffs demand a Jury Trial

SECTION E

Complaint

Plaintiffs, by their attorneys, bring this action against the defendants named herein, and, demanding a jury trial, complain and allege as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action instituted against defendants under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 and 28 U.S.C. § 1337 in order to prevent and restrain, and to recover damages from the defendants resulting from, violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

2. Each of the defendants transacts business and is found within the Eastern District of Louisiana. Each is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in violation of the antitrust laws as hereinafter alleged have been performed within the Eastern District of Louisiana.

II

THE PARTIES

3. Plaintiffs, City of Lafayette ("Lafayette") and City of Plaquemine ("Plaquemine"), Louisiana are municipal entities organized and existing under the laws of the State of Louisiana. Lafayette, and Plaquemine, prior to and at all times during the period covered by the complaint, have been engaged in the generation and distribution of electric power and energy for residential, commercial, and industrial customers in their respective cities and environs.

4. Defendant Louisiana Power & Light Company, hereinafter referred to as "LP&L," is named a defendant herein. It is a Florida corporation, engaged in the business of generation, transmission, and sale of electric power energy at wholesale and at retail, with its principal place of business in New Orleans, Louisiana. LP&L is a wholly owned subsidiary of Middle South Utilities, Inc.

5. Middle South Utilities, Inc., hereinafter referred to as "Middle South," a Florida corporation, is named a defendant herein. It is a public utility holding company owning and controlling electric operating companies as an integrated electric utility system in the States of Arkansas, Louisiana, Mississippi and Missouri. Constituent parts of its integrated electric utility system operating in Louisiana include its wholly owned subsidiaries, LP&L, and New Orleans Public Service, Inc., providing in Louisiana bulk electric generation and transmission as well as electric wholesale operations together with retail electric distribution operations.

6. Central Louisiana Electric Company, Inc., hereinafter referred to as "CLECO," is named a defendant herein. It is a Louisiana corporation engaged in the business of generation, transmission and sale of electric power and energy at wholesale and at retail, with its principal place of business in Lafayette, Louisiana.

7. Gulf States Utilities, hereinafter referred to as "Gulf States," is named a defendant herein. It is a Texas Corporation engaged in the business of generation, transmission and sale of electric power and energy in Louisiana at wholesale and at retail with offices in Baton Rouge, Louisiana.

III

Trade and Commerce

8. The electric power industry is comprised generally of three functional levels; generation, transmission and distribution. Generation encompasses the conversion into electric power of energy obtained from combustion of fossil fuels, from moving water, from atomic fission or from other energy sources. Transmission refers to the transportation of electric energy via a network of high voltage lines from points of generation to distribution areas. Distribution involves the delivery and sale of electric current to ultimate consumers. Each of the defendants engages in the electric business on all three levels.

9. The electric transmission systems of the defendants are interconnected. Defendants engage in the exchange of electricity with each other, and deal with each other in the purchase and sale of electric power and energy. Defendants are joint owners of major high voltage transmission facilities connecting electric systems in Louisiana and other states.

10. In addition to the electric power and energy which defendants generate in their own plants within the State of Louisiana and which they transmit to each other, defendants engage in the purchase, sale and exchange of electric power and energy with other electric systems within Louisiana. Such power and energy is transmitted through interconnections of defendants to or from other states to meet the electric system needs of defendants and those other electrical systems with which they deal and to maintain system reliability of all such electric systems.

11. Plaintiffs and other entities operate electrical systems in the general area of Louisiana in which defendants' electrical systems are located. Such other entities include Cajun Electric Power Cooperative, Inc. ("Cajun"), formerly operating under the name of Louisiana Electric Corporation ("LEC"), a membership corporation of REA electric distribution cooperatives, and DOW Chemical Company ("DOW"), an industrial corporation which owns and operates electric generation facilities of approximately 400,000 kilowatts. Neither the plaintiffs nor Cajon nor Dow own, control or operate transmission lines to provide any of them with access to, or interconnection with, each other or any electric systems other than those of defendants to effectuate bulk electric power sales to, purchases from, or exchange with, each other or such other electric systems.

12. Virtually all high voltage electric transmission lines and facilities in the area of Louisiana in which are located the electric generation and distribution facilities of plaintiffs, Cajun and Dow are under the exclusive ownership and control of the defendants. Each of the electric systems of the plaintiffs and those of Cajun and Dow are surrounded by one or more of the transmission and distribution systems of defendants. Defendants' transmission systems are interconnected with each other and, through such interconnected systems, defendants dominate and control access to electric systems other than those of defendants in the sale and purchase of electric bulk power. Plaintiffs thus must rely on one or the other of defendants, or on all of defendants jointly, for obtaining transmission of electric power and energy sold by plaintiffs to other electric systems or purchased by plaintiffs from others for resale to their retail customers.

13. On or about August 6, 1968, plaintiffs, together with Cajun and Dow, entered into an Interconnection and Pooling Agreement pursuant to which Cajun agreed to

build certain transmission lines to interconnect its member cooperatives with a generation station to be built by Cajun and with the electric systems of each of the plaintiffs and Dow, providing each of the parties to that Agreement access to transmission capability among and between the parties.

14. Cajun's proposed generation station and transmission lines were intended to be financed by a loan from the Rural Electrification Administration ("REA"), a division of the United States Department of Agriculture, in an amount of $56.5 million. Such loan was authorized by REA in September, 1964, and provided for construction by Cajun of a 200,000 kilowatt generating station and 1,611 miles of transmission lines.

15. The aforesaid August 6, 1968 Interconnection and Pooling Agreement provided for the establishment of an electric power pool, with coordinated planning for the serving of the load requirements of the Cajun electric cooperative members, plaintiffs and Dow. By application of the Agreement, each system would be assured of a four system market for the sale of all of its surplus capacity and secondary energy, and individual systems would size and time the construction of new generators in the best interests of the total pool market, although each individual system would remain ultimately responsible for providing adequate power supply for its own loads by generation expansion or purchase of power. The pool would provide backup electric power and energy for each system, with economy energy exchanges among the pool members.

16. Access by plaintiffs to transmission capability through the Interconnection and Pooling Agreement would have provided for substantial savings to plaintiffs from sharing of reserves, coordination of construction of new generation and consequent investment savings and efficiency savings, and more efficient operation of the existing generating capacity of the systems.

17. Construction of Cajun's electric transmission lines and generation facilities also would have enabled plaintiffs and Cajun to obtain electric power and energy and other coordinated electric services from the Southwestern Power Administration ("SPA"), a division of the United States Department of Interior. Plaintiffs, as owners and operators of municipal electrical systems, and Cajun, on behalf of its electrical cooperative members, are, and during the period covered by the complaint have been, entitled by law to obtain public electric SPA power in preference over defendants and other privately owned utilities. The acquisition of such low cost power, energy and services by plaintiffs from SPA would have resulted in economic advantages to plaintiffs.

IV

Offenses Charged

A. *Conspiracies*

18. Beginning at least at early as 1962, and continuing thereafter up to and including the date of the filing of the complaint, defendants have engaged in continuing unlawful combinations and conspiracies unreasonably to restrain and to monopolize interstate trade and commerce in the generation, transmission and distribution of electric power and energy in violation of Sections 1 and 2 of the Sherman Act.

19. The aforesaid combinations and conspiracies have consisted of continuing agreements, understandings, and concert of action between and among the defendants, the substantial terms of which have been:

(a) to refuse to wheel, or to allow the transmission over transmission lines or connections owned or controlled by the defendants or any of them, of electric power and energy from other wholesale suppliers to plaintiffs, from one plaintiff to another, or from a plaintiff to any electric system other than defendants;

(b) to boycott and refuse to deal with plaintiffs through interconnections, transmission and coordination except on terms that would maintain domination and exclusive control by defendants over electric bulk power supply and that would be harmful to the interests of plaintiffs;

(d) to utilize sham and baseless litigation, threats, coercion, false and misleading statements, and other means for the purpose and with the effect of delaying and preventing the financing, construction and use by Cajun of electric generation and transmission facilities which would have facilitated the implementation of the aforesaid Interconnection and Pooling Agreement of August 6, 1968 and would otherwise have benefited plaintiffs and others;

(e) to engage in other activities for the purpose and with the effect of restraining and eliminating competition in electric power and energy.

20. For the purpose of effectuating and carrying out the aforesaid combinations and conspiracies, the defendants have done those things, which as described in Paragraph 19 of this Complaint, they agreed to do.

B. *Attempts to Monopolize and Monopolization*

21. Beginning at least as early as 1962, and continuing thereafter to and including the date of the filing of this complaint, defendants have engaged in a continuing attempt to monopolize and have monopolized interstate trade and commerce in the generation, transmission and distribution of electric power and energy in violation of Section 2 of the Sherman Act.

22. Pursuant to and in furtherance of the aforesaid attempt to monopolize and monopolization, defendants have:

(a) obstructed and prevented the construction and operation by others of electric generation and

transmission systems which would compete with defendants in the generation, transmission and bulk sale of electric power and energy,

(b) refused and threatened to refuse to transmit electric power and energy for, to and from sources other than those which would maintain dominance and control by defendants over bulk power supplies and which would prevent competition with defendants in the generation, transmission and sale of electric power and energy,

(c) engaged in activities to foreclose suppliers and potential suppliers of bulk electric power from markets served by defendants, and

(d) performed those acts set forth in Paragraph 19 of this complaint which they had agreed to.

23. The aforesaid offenses will continue unless the relief hereinafter prayed for is granted.

V

Effects

24. The aforesaid unlawful combinations and conspiracies, attempt to monopolize and monopolization, have had the following effects, among others:

(a) Competition in the generation, transmission and wholesale sale and purchase of electric power and energy in interstate commerce has been suppressed and eliminated;

(b) Electric systems other than defendants, and particularly the plaintiffs herein, have been deprived of the benefits of competition in the generation, transmission and wholesale sale and purchase of electric power and energy;

(c) Retail residential, commercial and industrial consumers of electric power and energy have been deprived of benefits ensuing from free and open

competition between electric systems in the generation, transmission, sale and purchase of electric power and energy;

(d) Plaintiffs have been deprived of their freedom to contract for the generation, transmission, sale and purchase of electric power and energy under terms and conditions most favorable and beneficial to them and their citizens.

VI

Injury to Plaintiffs

25. As a direct and proximate result of the unlawful conduct hereinabove alleged, plaintiffs have: (1) been prevented from and continue to be prevented from profitably expanding their businesses; (2) lost and continue to lose the profits which would have resulted from the operation of an expanded, more efficient and lower cost business; (3) been deprived of and continue to be deprived of economies in the financing and operation of their systems; (4) sustained and continue to sustain losses in the value of their businesses and properties; and (5) incurred and continue to incur excessive costs and expenses they otherwise would not have incurred. Plaintiffs have not at this time ascertained the dollar amount of said damages.

VII

Prayer

Wherefore, plaintiffs pray:

1. That the court adjudge and decree that defendants, and each of them, have engaged in combinations and conspiracies unreasonably to restrain and to monopolize, and have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That each of the defendants and all persons, firms and corporations acting on its behalf or under its direction or control be permanently enjoined from engaging in carrying out, or renewing, any contracts, agreements, policies, practices, understandings, plans, programs or other arrangements, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act or any contract, agreement, policy, practice, understanding, plan, program or arrangement having like or similar purpose or effect.

3. That the plaintiffs have such other and further relief as is necessary and appropriate.

4. That each of the plaintiffs recover from the defendants its damages, pursuant to and on the basis provided by Section 4 of the Clayton Act.

5. That each of the plaintiffs be awarded its reasonable attorneys' fees and costs as provided by Section 4 of the Clayton Act.

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By s/ Worth Rowley
Worth Rowley (T. A.)

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By s/ Robert E. Winn
Robert E. Winn

Attorneys for Plaintiffs Lafayette, City Hall, Lafayette, Louisiana 70501, and Plaquemine, Louisiana, City Hall, Plaquemine, Louisiana, 70764

PLEASE SERVE:

Central Louisiana Electric Company
Through Agent for Service of Process
W. D. Rodemacher
or
R. E. Chappuis
415 Main Street
Pineville, Louisiana

Louisiana Power & Light Company
Through Agent for Service of Process
Melvin I. Schwartzman
or
Andrew P. Carter
1424 Whitney Building
New Orleans, La. 70130

Gulf States Utilities Company
Through Agent for Service of Process
Virgil M. Shaw
446 North Boulevard
Baton Rouge, Louisiana

Middle South Utilities Company
Pursuant to La. R.S. 13:3201 et seq.,
mailing of certified copy of Summons
and Complaint to
280 Park Avenue
New York, N. Y. 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

SECTION "E"

(Filed: December 3, 1973)

Answer

FIRST DEFENSE

The complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

This action is barred in whole or in part by the applicable statute of limitations and by principles of laches and estoppel.

THIRD DEFENSE

The Plaintiffs are not entitled to relief because they have no standing to sue.

FOURTH DEFENSE

Insofar as the activities complained of consist of actions taken by the defendant pursuant to its right to petition government and its right to freedom of speech, and its right not to be deprived of property without due process of law, all rights guaranteed by the Constitution of the United States, these activities are not actionable.

FIFTH DEFENSE

Insofar as the activities complained of consist of attempts made by the defendant to secure executive, legislative, judicial or administrative action by government officials, these activities are not covered by the anti-trust laws, being within the *Noerr-Pennington* exception.

SIXTH DEFENSE

To the extent that the activities complained of consist of responses by the defendant to the illegal activity of

plaintiffs and others, they constitute neither an attempt to monopolize, monopolization or any other violation of the anti-trust laws.

SEVENTH DEFENSE

Insofar as the damages complained of result from decisions of officers of the executive, legislative or judicial branches of federal and State governments, defendant is not liable therefor for any harm which plaintiffs may have incurred.

EIGHTH DEFENSE

Insofar as the activities of defendant complained of were pursuant to State or Federal law governing the electric utility industry, the defendant is not liable under the anti-trust laws for these activities.

NINTH DEFENSE

The FPC has primary jurisdiction of the claims asserted herein. Substantially similar claims have already been asserted by these plaintiffs against certain of the defendants in proceedings now pending before the FPC, and prosecution of this action should accordingly be stayed pending resolution of these various proceedings before the FPC.

ANSWER

Defendant admits that plaintiffs' complaint adopts the statutory language of the Sherman Antitrust Act and decisions interpreting it in stating the conclusion that LP&L has violated the law, but since these conclusions do not relate to the acts alleged in any understandable manner, and since Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations, LP&L denies each and all of the allegations of the Complaint, except that it admits it is engaged in business in the Eastern District of Louisiana, and is a Florida corporation.

COUNTERCLAIM

1. Beginning in 1968 plaintiffs have to this date continually and unlawfully conspired and contracted with

others unreasonably to restrain and monopolize interstate trade and commerce in the provision of electric power and energy in the geographic markets within and adjacent to their respective service areas and those of the Louisiana rural electric cooperatives, have attempted to monopolize said trade and commerce and have in fact monopolized said trade and commerce in areas within their reach and have restrained trade and commerce in those areas. These unlawful activities consist of the following:

(a) Plaintiffs, together with Cajun Electric Power Co-operative, have agreed, conspired, and acted in furtherance of their unlawful ends to engage in sham and frivolous litigation against the defendant, LP&L, and others before the Securities and Exchange Commission, the Federal Power Commission, the Atomic Energy Commission, the United States Justice Department and the Federal courts to injure defendant LP&L in securing private financing of LP&L's business operations and with the purpose and effect of delaying or preventing LP&L's construction of a nuclear electric generating facility;

(b) Plaintiffs have included in their respective debentures covenants to exclude all competition in the provision of electric power and energy within their municipal boundaries;

(c) Plaintiffs entered into an agreement between themselves and among themselves, Louisiana Electric Cooperative (now CEPCO) and The Dow Chemical Company for the provision of electric power and energy in areas within their reach for a longer term than lawful under the laws of the State of Louisiana, thereby excluding and/or attempting to exclude lawful periodic competition for the market comprised of such areas.

2. As a direct and proximate result of the unlawful conduct of the plaintiffs alleged above, defendant has sustained the following injury:

(a) LP&L has been hindered and continues to be hindered in the financing of its business operations;

(b) LP&L has lost, and continues to lose, the profits which it would earn in supplying electricity to the City of Plaquemine;

(c) LP&L has lost the advantages which it would have received from the timely construction of its nuclear generating facility which, if construction were to begin immediately, would cost LP&L 180 million dollars more than if it had been built as scheduled.

LP&L has not at this time ascertained the full dollar amount of said damages.

WHEREFORE, defendant Louisiana Power & Light Company, prays that the Court enter judgment dismissing all claims by plaintiffs against Louisiana Power & Light Company and awarding damages to LP&L treble the amount of damages ultimately suffered by it as the result of the unlawful conduct by plaintiffs.

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WILLIAM T. TETE
By /s/ ANDREW P. CARTER
1424 Whitney Building
New Orleans, Louisiana 70130
Attorneys for Louisiana Power & Light Company

CERTIFICATE

I hereby certify that a copy of the foregoing Answer and Counterclaim has been served upon counsel of record for each party by depositing same, addressed to each trial attorney, in the United States Mail, postage prepaid, on this 3 day of December, 1973.

/s/ ANDREW P. CARTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed January 17, 1974)

Reply to Counterclaim of Louisiana Power and Light Company

Plaintiffs, by their attorneys, for reply to the counterclaim filed herein by defendant Louisiana Power & Light Company, state as follows:

FIRST DEFENSE AS TO ALL CLAIMS

In reply to the counterclaim, paragraph by paragraph, plaintiffs:

1. Deny each and every allegation of paragraph 1 in the counterclaim.

1(a). Deny each and every allegation of subparagraph 1(a) in the counterclaim except that plaintiffs admit they have, to protect their rights and preserve their electric utility operations from illegal activities, properly engaged in litigation in the Federal Courts against defendant Louisiana Power & Light Company (LPL) and others and have intervened and appeared in proceedings involving LPL or others before the Securities and Exchange Commission, the Federal Power Commission, and the Atomic Energy Commission; further, that plaintiffs have petitioned the Federal Government, in particular the United States Department of Justice, to report acts which they believe amount to criminal wrongdoing on the part of LPL and others.

1(b). Deny each and every allegation in subparagraph 1(b) of the counterclaim except that plaintiffs admit that

individually they each have borrowed monies to finance their municipal electric systems and that each said borrowing is and has been pursuant to an Indenture, which contains covenants for the protection of the debenture holders. One such covenant, required by the financings, precludes the granting of electric franchises within the respective borrower's municipal boundaries which would render services or facilities in competition with the municipal electric system. Plaintiffs deny that said convenants are unlawful.

1(c). Deny each and every allegation in subparagraph 1(c) of the counterclaim except that plaintiffs admit that they entered into an agreement between and among themselves, Louisiana Electric Cooperative (now CEPCO) and the Dow Chemical Company for the interconnection, coordination, and pooling of electric energy.

2. Deny each and every allegation in paragraph 2 and each of its subparagraphs of the counterclaim.

3. Each and every allegation of the counterclaim not hereinabove answered is expressly denied.

SECOND DEFENSE AS TO ALL CLAIMS

4. Plaintiffs are municipalities, bodies corporate and politic, subdivisions of the State government. The Sherman Act does not apply to governmental entities or their actions.

THIRD DEFENSE AS TO ALL CLAIMS

5. The counterclaim fails to state a claim upon which relief can be granted.

FOURTH DEFENSE AS TO ALL CLAIMS

6. All or part of each of the claims set forth in the counterclaim is barred by the applicable statute of limitations.

WHEREFORE, the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana respectfully pray that judgment be entered herein dismissing the counterclaim of Louisiana Power & Light Company, and that costs be assessed against said Louisiana Power & Light Company.

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By: /s/ JEROME A. HOCHBERG
Jerome A. Hochberg

/s/ HENRY N. LIBBY
Henry N. Libby

SESSIONS, FISHMAN, ROSENSON,
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By:
Robert E. Winn

Attorneys for the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply to Counterclaim of Louisiana Power & Light Company has been served on all counsel of record for all parties by mail on this 15th day of January, 1974.

/s/ JEROME A. HOCHBERG
Jerome A. Hochberg

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION E

(FILED: JANUARY 18, 1974)

Motion for Leave To Amend and Supplement Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), moves the Court for an order permitting it to amend Answer and Counterclaim filed herein in the following particulars:

I.

That the second line of paragraph 1 of defendant's counterclaim be amended to read: "unlawfully conspired, combined and contracted with others unreasonably to restrain and".

II.

That subparagraph (a) of paragraph 1 of defendant's counterclaim be amended to read as follows:

> "a) Plaintiffs, together with Cajun Electric Power Cooperative, Inc. and Dow Chemical Corporation, have agreed, conspired, combined and acted in furtherance of their unlawful ends to engage in sham and frivolous litigation and related activity against the defendant, LP&L, and others before the Securities and Exchange Commission, the Federal Power Commission, the Federal courts, and have agreed, conspired, combined and acted with said persons, certain members of the Louisiana Municipal Association and others to conduct said unlawful activity before the Atomic Energy Commission and the United States Department of Justice, the purpose and effect of said litigation and activity being to injure the defendant in securing private financing of its business operations and to delay or prevent LP&L's construction of a nuclear electric

> generating facility so that the plaintiffs and others might promote their private gain at the expense of severe injury to the public and to LP&L."

III.

That Defendant's prayer for relief be amended by the addition to the last line of its answer and counterclaim, after the last word thereof, of the following: "plus reasonable attorneys' fees and interest as permitted by law and for such further relief as the Court may deem just and proper."

The grounds of this motion are that justice requires the amendment in order that the actual issues between the parties be tried, since the amendment is necessary to clarify the issues and to include material inadvertently omitted.

Defendant further moves that said amendments be granted, and that the same be taken and treated as made without rewriting the answer filed herein.

Respectfully submitted,

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WILLIAM T. TETE

By /s/ ANDREW P. CARTER
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New Orleans, Louisiana 70130

Attorneys for Louisiana Power & Light Company

CERTIFICATE

I hereby certify that a copy of the foregoing Motion for leave To Amend and Supplement Answer and Counterclaim in Antitrust Action has been served upon counsel of record for each party by depositing same, addressed to each trial attorney, in the United States mail, postage prepaid, on this 18th day of January 1974.

/s/ ANDREW P. CARTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed February 11, 1974)

Reply of City of Lafayette and City of Plaquemine to Amended Counterclaim of Louisiana Power & Light Company

Plaintiffs, by their attorneys, for reply to the amended counterclaim of Louisiana Power & Light Company:

1. Deny all amended paragraphs in the counterclaim as amended to the same effect and with the same treatment as set forth in the Reply to Counterclaim of Louisiana Power & Light Company; and

2. Reassert with respect to the amended counterclaim each and every defense set forth in the Reply to Counterclaim of Louisiana Power & Light Company; and

3. Incorporate this Reply to Amended Counterclaim into and with the Reply to Counterclaim of Louisiana Power & Light Company so as to treat both as one complete Reply without rewriting the initial Reply filed herein.

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By: Jerome A. Hochberg

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/s/ ROBERT E. WINN
By: Robert E. Winn

Attorneys for the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana

MINUTE ENTRY
February 11, 1974
Lee, M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action Number 73-1970

SECTION "E"

(Entered Feb. 13, 1974)

There being no opposition to the Motion for Leave to Amend and Supplement Answer and Counterclaim in Antitrust Action Filed by Louisiana Power & Light Company,

IT IS ORDERED that the motion is herewith GRANTED.

CLERK TO NOTIFY COUNSEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action Number 73-1970

SECTION "E"

(Filed July 23, 1974)

Motion for Leave To Amend and Supplement Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), moves the Court for leave to amend and supplement its Answer and Counterclaim in the particulars set forth in the Amending and Supplemental Answer and Counterclaim appended hereto and for cause shows that the interest of justice so requires in order that the actual issues

between the parties be tried, and further that said amendments be taken and treated as made without rewriting the Answer and Counterclaim filed herein.

Respectfully submitted,

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WILLIAM T. TETE

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Telephone: 525-8181

Attorneys for Louisiana Power & Light Company

OF COUNSEL:

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Minute Entry
September 12, 1974
Cassibry, J.

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

SECTION "E"

(FILED: SEP. 13, 1974)

This cause came on for hearing on September 11, 1974 on motion by Louisiana Power & Light Company for leave to amend and supplement answer and counter-claim in

antitrust action, was argued by counsel for the respective parties and submitted.

Whereupon, and upon consideration thereof:

IT IS ORDERED that the motion by Louisiana Power & Light Company for leave to amend and supplement answer and counterclaim in antitrust action be, and the same is, hereby DENIED.

/s/ FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

Jerome A. Hockberg, Esq.
Robert E. Winn, Esq.
Malcolm Stevenson, Esq.
Walter E. Workman, Esq.
George Spiegel, Esq.
Tom F. Phillips, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

CIVIL ACTION
No. 73-1970

(FILED OCT. 1, 1974)

Motion of Louisiana Power & Light Company for Reconsideration, or in the Alternative, Amendment of Order

Now into Court through undersigned counsel comes defendant Louisiana Power & Light Company and moves that the Court reconsider its Order of Friday, September 13, 1974, in the above-captioned matter and grant defendant leave to amend its counterclaim. If the Court is, and remains, of the opinion that plaintiffs are not subject to the antitrust laws and that the amendment, which is set out in Appendix I hereto, does not state a claim upon which relief can be granted, defendant asks in the alternative that the Court permit the amendment and direct the entry of judgment, upon an express determination that there is no

just reason for delay, against Louisiana Power and Light Company on the entire counterclaim. In the further alternative, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, defendant moves that the Court amend its Order to include the statement required by 28 U.S.C. § 1292(b) that said order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. In addition, LP&L requests the Court to assign written reasons and for clause shows:

(1) Since the principal ground set forth in opposition to leave to amend is also applicable to the unamended counterclaim, orderly disposition of the question requires that leave be granted to defendant to amend and that plaintiffs thereafter address their argument to the amended counterclaim, and

(2) The weight of authority supports defendant's position that the antitrust laws do apply to the conduct of a municipally-owned electric system when, under the law of the State wherein the municipality is situated, that system does not act as a governmental agent for the State in its operations, and

(3) That the principal ground set forth in the opposition to the counterclaim, the absolute immunity of municipally-owned electric systems, although erroneous, would require the dismissal of the entire counterclaim, thus there is no just reason for delay in entering judgment against Louisiana Power & Light Company if it adheres to the belief that ground is well-founded, and

(4) The granting of motion for leave to amend or the amendment of the Court's Order would expedite the termination of this litigation since the same question of law would ultimately be presented with respect

to the unamended counterclaim and defendant has just cause to commence a separate antitrust action against plaintiffs as shown by attached affidavit of J. M. Wyatt, Appendix II, hereto.

Wherefore, Louisiana Power & Light Company respectfully moves that the Court reconsider its Order of Friday, September 13, 1974, and grant defendant leave to amend, that if the Court is and remains of the opinion that the amendment does not state a claim upon which relief can be granted, in the alternative that the Court direct the entry of judgment, upon an express determination that there is no just reason for delay, against defendant with respect to defendant's entire counterclaim, or in the further alternative, that the Court amend said Order to include the statement that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and further that the Court assign written reasons.

Respectfully submitted,

Monroe & Lemann
Andrew P. Carter
W. Malcolm Stevenson
William T. Tete

By: /s/ Andrew P. Carter
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Attorneys for Louisiana Power & Light Company

Of Counsel:

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APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Title Omitted in Printing]

Civil Action

No. 73-1970

Section "E"

Amending and Supplemental Answer and Counterclaim in Antitrust Action

Defendant, Louisiana Power & Light Company (LP&L), amends its Answer and Counterclaim filed herein in the following particulars:

I

Paragraph 1 of defendant's Counterclaim is amended by the addition of subparagraph (d) to follow subparagraph (c) on page 3 of said Answer and Counterclaim to read as follows:

"d) Plaintiff, City of Plaquemine, has unlawfully restrained trade and conspired with other municipalities in the State of Louisiana in violation of § 1 of the Sherman Act, § 3 of the Clayton Act, and the Louisiana law of public utilities by contracting to provide customers outside city limits certain products (e.g., gas and water) only on the condition that said customers also purchase a different tied product, i.e., electricity, or at least agree that they will not purchase that tied product from any other supplier."

II

Paragraph 2 of defendant's Counterclaim is amended by the addition of subparagraph (d) to follow subparagraph (c), which ends on page 4 of said Answer and Counterclaim, to read as follows:

"d) LP&L has lost, and continues to lose, the profits which it would earn in supplying electricity in the

areas adjacent to but outside the city limits of the City of Plaquemine and other municipalities."

III

The defendant's prayer for relief is amended by the addition to the end thereof of the following:

"Louisiana Power & Light Company also prays that the Court enjoin the City of Plaquemine from entering into unlawful tie-in contracts as set forth above and declare null and void all such contracts heretofore entered into by Plaquemine. In the alternative, should the Court determine that treble damages are not due Louisiana Power & Light Company under federal law, Louisiana Power & Light Company prays that the Court award it any and all compensatory damages which are due Louisiana Power & Light Company under the laws of the State of Louisiana."

The grounds of this motion are that justice requires the amendment in order that the actual issues between the parties be tried.

Defendant further moves that said amendments be granted, and the same be taken and treated as made without rewriting the Answer filed herein.

Respectfully submitted,

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Attorneys for Louisiana Power & Light Company

APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

Affidavit of J. M. Wyatt

PARISH OF ORLEANS
STATE OF LOUISIANA } ss:

J. M. Wyatt, being first duly sworn, on knoweldge, information and belief deposes and says:

I am Senior Vice-President of Louisiana Power & Light Company (LP&L). Plaintiffs are both members of an unincorporated association of representatives of municipality utility personnel, known as the Louisiana Municipal Association Utilities Group (LMAUG), whose purpose may be described as representing the common interests of such municipally-owned utility systems.

In the course of operating our business, numerous instances have come to our attention in which the individual members of Louisiana Municipal Association Utilities Group have required persons living outside municipal corporate limits to take electricity from them in order to get gas, water, and in some instances sewerage services.

With respect to Plaquemine Light and Water, it was reported in the *Greater Plaquemine Post* of 13 July 1972 that the City had agreed to serve "South Plaquemine" (outside the corporate limits of Plaquemine) with water "provided these customers buy electricity from the City." (Appendix A) Subsequently, the reports of a policy of tie-ins have been confirmed by LP&L personnel, who have been advised by residents of the area immediately to the south of Plaquemine that the municipal utility system has refused to provide them with gas or water unless they agreed to take electric service from the City rather than from LP&L.

Instances of parallel conduct among other municipal electric systems have been reported. For example, in a Legal Advertisement placed in *The Daily Comet* (Lafourche Parish) on Wednesday, March 6, 1974, the minutes of the proceedings of the Board of Trustees of the City of Thibodaux (Appendix B, third page), a request for sewerage services by the Terrebonne Bank and Trust Company was considered. It is reported: "The Trustees agreed that they would be happy to furnish their sewerage servce to the Bank of Terrebonne at no cost to the City, provided they use the City's utility services since this has always been a policy of the City." Subsequently, it was reported by LP&L personnel, the City of Thibodaux agreed to furnish sewerage service to a parish school situated outside the city limits, provided that the school also take electricity.

The earliest example of such conduct that has come to my attention is that of the City of Jonesboro. In the report of the proceedings of the Town Council of Jonesboro of August 13, 1963, published in the *Jackson Independent* of August 22 (Appendix C) it is reported:

> "Motion by T. L. Colvin & seconded by J. P. Gimber that an ordinance be adopted to refuse the sale of water to anyone, except electrical customers of the Town of Jonesboro, Louisiana
>
> All voted in favor thereof."

LP&L personnel have reported that as recently as late 1972 residents outside the city limits have been forced to take electricity from Jonesboro rather than LP&L in order to get water.

In addition to the above, LP&L personnel have reported that the City of Houma has refused to serve residents outside its city limits with gas and sewerage unless they agreed to take electricity from the municipal electric system. They have reported many instances in which the City of Monroe has refused gas, water and/or sewerage to

persons outside the city limits unless they agreed to take electricity from the City. Mr. Roy Lange, General Manager of the City of Monroe Utilities Commission, has testified that on behalf of that municipality, he offered General Motors Corporation gas, water, and electricity as a "package" agreement for their plant outside the City limits and not as individual agreements. Monroe now serves those customers with electricity although LP&L had adequate electric facilities on the General Motors property many years before the City of Monroe solicited General Motors and then constructed duplicating facilities to the plant site.

Another city which appears to practice tie-ins is the City of Winnfield. Employees of LP&L have reported an instance of requiring a customer to take electricity in order to get water in 1973. However, Winnfield may not be a member of LMAUG.

LP&L does not serve customers in the immediate area of plaintiff, Lafayette, and therefore has no direct knowledge of whether that municipal utility system imposes similar restraints on commerce in electricity. However, it does believe that even before discovery, it had obtained sufficient evidence of parallel action in restraint of trade by members of the LMAUG to warrant an inference of combination or conspiracy. The regular practices of the members of the LMAUG with respect to selling gas and water only upon condition that a customer take electricity would seem to be in violation of the Sherman Act and the Clayton Act, as we understand these laws.

/s/ J. M. Wyatt
J. M. Wyatt

Sworn to and Subscribed Before Me on the 30th Day of September, 1974.

/s/ Steven O. Medo Jr
Notary Public

My Commission is issued for life.

Appendix A

CITY WANTS TO SELL ELECTRICITY TO SOUTH PLAQUEMINE AREA

The City of Plaquemine is continuing its massive search for additional revenue, and at Tuesday night's meeting the Council voted to close the gap on a couple of revenue-producing avenues which have, until now, been left wide open.

First of all the Council authorized Mayor Gallagher to contact the Louisiana Power and Light Co. to negotiate a purchase of poles, transformers and lines which are presently servicing the City Trailer Court, the residences on Lucky Street, and the Cottage Tourist Courts in South Plaquemine. Mayor Gallagher explained that the City agreed to service this area with water some years ago provided these customers buy electricity from the City. The Mayor said the late 'Mr. Gus' Pizzolato had negotiated the agreement with the City, since the trailer park, the residences on Lucky Street, and the Tourist Courts were either owned by him or members of his family.

The Mayor explained that he would contact Louisiana Power and Light Co., and attempt to negotiate a purchase of their facilities. He said if this is not possible then the City would run its own lines to service the area. The Council gave him a green light to proceed. The Mayor said the family was agreeable to the change-over.

Appendix B

LEGAL ADVERTISEMENT

LEGAL NOTICE

Proceedings of the Board of Trustees
City Hall
Thibodaux, Louisiana
January 29, 1974

The Board of Trustees of the City of Thibodaux, State of Louisiana met in regular session at its regular meeting place, City Hall, Thibodaux, Louisiana, on Tuesday, January 29, 1974 at three (3:00) o'clock p.m.

Present and answering roll call were the following members:

Honorable Warren J. Harang, Jr., Trustee of Public Safety and Ex-Officio Mayor; Honorable Bertrand F. Herbert, Trustee of Public Property and Honorable Joe N. Silverberg, Trustee of Finance and Ex-Officio Tax Collector.

There were absent: none.

Also present was Mr. David Richard, City Attorney.

On motion of Trustee Harang, seconded by Trustee Silverberg, the minutes of January 22, 1974 were unanimously approved.

• • • •

(portions of Appendix B omitted in printing)

• • • •

Trustee Harang presented a letter for Mr. Royce J. Pierce, Project Coordinator for Rizzo-Thibodeaux and Associates, Inc., requesting the City of Thibodaux to allow the Terrebonne Bank & Trust Company to be connected to the city's sewerage facilities.

The Trustees agreed that they would be happy to furnish this sewerage service of the Bank of Terrebonne at no

cost to the city, provided they use the city's utility services since this has always been a policy of the City.

The Clerk was instructed to write to Mr. Pierce of the Board's decision,

• • • •

(remaining portions of Appendix B omitted in printing)

APPENDIX C

PROCEEDINGS OF TOWN COUNCIL OF JONESBORO

Jonesboro, Louisiana
August 13, 1963

The Town Council met on the above date, in regular session, at the regular meeting place. The City Hall, Jonesboro, Louisiana, at seven thirty (7:30) o'clock P.M. with the following members present to-wit:

Mayor: L. O. Tait
Alderman: E. L. Thompson
Alderman: E. E. Rogers
Alderman: T. L. Colvin
Alderman: R. L. Salter
Alderman: J. P. Gimber
Absent: None

Motion by T. L. Colvin & seconded by J. P. Gimber that minutes of June 11, 1963, be approved as read.

Motion was carried.

Motion by J. P. Gimber seconded by T. L. Colvin that a Resolution be adopted to approve a Sub-Lease from Jackson Parish Fair Asso'n. to Jonesboro Hodge riding Club for Rodeo Arena Area.

Motion was carried.

Motion by T. L. Colvin & seconded by E. L. Thompson that the lease with Tremont Lumber Company be approved, at annual rental of $25.00 for water Well purposes.

Motion was carried.

Motion by R. L. Salter & seconded by E. E. Rogers to accept low bid of Eddington Drilling Company, in the amount of $19,321.00 for drilling; of water well & installation of all necessary Equipment for proper operation thereof. And ratify Mayor's execution of contract for same.

Motion was carried.

Motion by T. L. Colvin & seconded by J. P. Gimber that an ordinance be adopted to refuse the sale of water to anyone, except electrical customers of the Town of Jonesboro, Louisiana.

All voted in favor thereof.

Motion by E. L. Thompson & seconded by R. L. Salter that meeting adjourn.

Meeting adjourned.

L. O. Tait
Approved
Ralph Nunn
Attested
Aug. 22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 73-1970

SECTION "E"

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs*

v.

LOUISIANA POWER & LIGHT COMPANY, MIDDLE SOUTH UTILITIES, INC., CENTRAL LOUISIANA ELECTRIC COMPANY, and GULF STATES UTILITIES COMPANY, *Defendants.*

(Filed November 12, 1974)

Motion To Dismiss Louisiana Power & Light Company's Counterclaim, as Amended, and for Judgment on the Pleadings with Respect to Said Counterclaim Pursuant to the Second Defense of Plaintiffs' Reply to Said Counterclaim

Plaintiffs, City of Lafayette and City of Plaquemine, move the Court to dismiss Louisiana Power & Light Company's Counterclaim, as amended, and for judgment on the pleadings with respect to said Counterclaim pursuant to the Second Defense of Plaintiffs' Reply to said Counterclaim on the grounds that said Counterclaim charges antitrust law violations which are not applicable to the states or their instrumentalities. The plaintiffs are municipalities, bodies corporate and politic and subdivisions of the State of Louisiana. As such, the Counterclaim, as

amended, does not assert a valid claim and should be dismissed.

Respectfully submitted,

ROWLEY & SCOTT

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SESSIONS, FISHMAN, ROSENSON, SNELLINGS & BOISFONTAINE

By ROBERT E. WINN

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Attorneys for City of Lafayette and City of Plaquemine

Dated: November 11, 1974

MINUTE ENTRY
February 28, 1975
Cassibry, J.

[TITLE OMITTED IN PRINTING]

Civil Action No. 73-1970

SECTION "E"

(Filed March 3, 1975)

Order

IT IS THE ORDER OF THE COURT that the motion of LP&L to amend its' counterclaim be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to dismiss the entire counterclaim, as amended, be, and the same is hereby GRANTED.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate determination of this litigation. 28 U.S.C. § 1292(b).

REASONS

This action by the Cities of Lafayette and Plaquemine, Louisiana, alleges antitrust violations on the part of Louisiana Power & Light Co., a Louisiana public utility (hereinafter LP&L), and others; plaintiffs seek injunctive relief and treble damages.

LP&L answered the suit and also filed a counterclaim, in which it alleged antitrust violations on the part of the plaintiff cities. Plaintiffs submitted an answer to the counterclaim denying all allegations. LP&L then filed a motion to amend its counterclaim and this motion was granted without opposition.

Subsequently, LP&L filed a new motion to amend its counterclaim, to include in it, allegations of Sherman and Clayton Act violations by plaintiffs in connection with certain tie-in arrangements. Specifically, LP&L claims that the City of Plaquemine has adopted a practice of offering residents outside of their municipal limits, such services as water, gas and sewerage, but only on the condition that they take electric service from the city and not from another supplier, *i.e.*, LP&L.

On September 13, 1974, this court denied LP&L's motion to amend its counterclaim holding that the antitrust laws of the United States do not apply to activities which are purely those of the state or its instrumentalities.

LP&L thereafter, filed a motion for reconsideration of this order. Simultaneously, the plaintiffs filed a motion to dismiss the original counterclaim. It is agreed among the parties that if the amended counterclaim is improper then the original counterclaim must fail for the same reason.

The sole issue therefore, is whether the antitrust laws of the United States are applicable to activities of a state or its municipalities.

Plaintiffs contend that the doctrine of nonapplicability of the antitrust laws to the states is a longstanding and well established rule. Once it is determined that the activities are those of the state no further inquiry is appropriate because the antitrust laws do not apply. See *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974).

LP&L disagrees, and contends that the proper analysis of antitrust allegations against a state or its instrumentalities is a two step process. First, the court examines whether state activity is involved and secondly, the court decides whether the state is acting in a governmental capacity. Unless *both* steps are satisfied the state's actions can and should be answerable under the antitrust laws.

In essence LP&L argues that if the state's activity is proprietary in nature then the antitrust laws *do* apply.

The inapplicability of the antitrust laws to the states was first enumerated in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Supreme Court noted that:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . .
>
> There is no suggestion of a purpose to restrain state action in the Acts's legislative history. 317 U.S. at 351-52.

Subsequent cases have adopted as the rule of the *Parker* Case that the antitrust laws do not apply to state governmental actions, including those delegated to an agency or municipality of the state. *See Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

However, other cases treat *Parker* in a less expansive way, permitting a court to examine the type or extent of state activity involved. *See Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Buildings Inc.*, 424 F.2d 25 (1st Cir. 1970). However, these cases generally involve state action, in concert with private enterprise, thereby distinguishing them from the instant case.

The Fifth Circuit Court of Appeals in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) has recently addressed itself to the question. The decision in that case clearly holds that state governmental entities

are "outside the ambit of the Sherman Act. 487 F.2d at 1028.

In *Saenz*, a slide rule manufacturer brought a treble damage action alleging that the defendants had violated Section 1 of the Sherman Act by conspiring to effect the rejection of plaintiff's product for use in interscholastic competition among Texas public schools. The defendants included the University Interscholastic League (UIL), its director, Lenhart, and L. R. Ridgway Enterprises, Inc., a competitor of the plaintiff's whose product was ultimately selected for use in the competition. UIL and Lenhart filed motions to dismiss the complaint on the grounds that as a state agency and state official, they were not answerable under the Sherman Act. The district court granted defendants' motions and the Fifth Circuit affirmed. The Court of Appeals concluded:

> . . . . the League is a governmental entity exempt from the Sherman Act.
>
> As this Court has previously said, '. . . . it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.' *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968).

The language of the *Saenz* case is clear, however, its applicability to this case is less certain. *Saenz* involves a state instrumentality, namely the UIL, acting in a capacity and in an area that is generally considered to be exclusively state governmental activity, i.e., education of its citizens. The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and

implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States.

In order to clarify the record, and place the issue in the most favorable posture for appeal, it shall be the order of the court that LP&L's motion to amend its counterclaim be granted and the entire counterclaim, as amended, be dismissed.

/s/ Fred J. Cassibry
United States District Judge

Worth Rowly, Esq.
George Spiegel, Esq.
Robert E. Winn, Esq.
Tom F. Phillips, Esq.
Denis McInerney, Esq.
Andrew P. Carter, Esq.
William O. Bonin, Esq.
Walter E. Workman, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Title Omitted in Printing]

Civil Action Number 73-1970

Section "E"

(Entered March 13, 1975)

Order for Final Judgment

On the prior Order of this Court dated February 28, 1975 and entered March 3, 1975, it being the determination of this Court that there is no just reason for delay in entering final judgment on defendant Louisiana Power & Light Company's entire amended counterclaim, it having been agreed by counsel for Louisiana Power & Light Company that its appeal of this matter will not delay prosecution of plaintiffs' claim, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

Ordered, that final judgment be entered herein that said counterclaim of defendant Louisiana Power & Light Company, as amended, against each of the cities of Lafayette and Plaquemine be, and hereby is, dismissed.

Done this 13 day of March 1975.

/s/ Fred J. Cassibry
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[Title Omitted in Printing]

Civil Action Number 73-1970

Section "E"

Notice of Appeal

Notice is hereby given that Louisiana Power & Light Company, a defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final order entered, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, dismissing defendants' counterclaim in this action on the 13th day of March, 1975.

March 31, 1975.

Monroe & Lemann
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W. Malcolm Stevenson
William T. Tete
Kenneth P. Carter

By /s/ Andrew P. Carter
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New Orleans, Louisiana 70130
Telephone: 586-1900

Attorneys for Louisiana Power & Light Company

CERTIFICATE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal has been served upon counsel of all parties of record in the foregoing proceeding, by depositing a copy of same in the U.S. Mails, postage prepaid, this 31 day of March, 1975.

/s/ William T. Tete

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER AND LIGHT COMPANY, *Defendant and Appellant.*

Appeal from the United States District Court for the Eastern District of Louisiana

(MAY 27, 1976)

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

TJOFLAT, *Circuit Judge.*

The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws. Answering in the negative, we reverse the decision below and remand for further proceedings.

I

A complaint filed on July 24, 1973, by the cities of Lafayette and Plaquemine, Louisiana (the Cities), alleged that appellant Louisiana Power & Light Company (Power & Light) and three other privately owned utilities had violated Sections 1 and 2 of the Sherman Act.[1] The allegations of this complaint are not involved in the present appeal. In its amended counterclaim, Power & Light charged the Cities with having themselves violated the federal antitrust laws in several respects. These allegations can be summarized as follows: (a) that the Cities were conducting sham litigation in order to delay or prevent Power & Light's construction of a nuclear power plant; (b) that anticompetitive covenants were included in the Cities' deb-

[1] 15 U.S.C. Sections 1, 2.

entures;[2] (c) that the Cities had conspired with other parties to extend the provision of power to certain service areas beyond the time periods allowed by state law; (d) that the city of Plaquemine was requiring customers outside its city limits to purchase electricity from the city in order to obtain gas and water. All of these actions were alleged to violate Sections 1 and 2 of the Sherman Act. The "tie-in" of electricity to gas and water was alleged to violate Section 3 of the Clayton Act,[3] as well. In its order of February 28, 1975, the trial court dismissed the entire counterclaim. While noting its reluctance to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the court held that the plaintiffs' status as cities was sufficient to bring all their conduct within the "state action" exemption as announced in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and as interpreted by this Court in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). Following the entry of final judgment dismissing Power & Light's counterclaim on March 13, 1975, this appeal was taken.

II

In *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Supreme Court has defined the extent to which state governmental entities are exempt from the antitrust laws. The earlier case was a suit to enjoin the enforcement of an agricultural marketing program which had been established by a California statute. Noting that the program "derived its authority and its efficacy from the legislative command of the

[2] These covenants were described as "covenants to exclude all competition in the provision of electric power and energy within [the plaintiffs'] municipal boundaries." Trial Record at p. 14. The specific nature of the alleged covenants cannot be determined from the record before this Court.

[3] 15 U.S.C. Section 14.

state . . . ", 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 326, the Court held that the defendants' conduct was beyond the reach of the Sherman Act.[4] The Court could "find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.* at 350, 51, 63 S.Ct. at 313, 87 L.Ed. at 326. By legislative command, the state had adopted an anticompetitive program and prescribed the terms of its operation. Violations were punishable under the state's penal code. In the Court's view, a restraint which the state, "as sovereign, imposed . . . as an act of government . . . ", could not be made the basis for Sherman Act liability. *Id.* 317 U.S. at 352, 63 S.Ct. at 314, 87 L.Ed. at 327.

The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the "state action" doctrine. In *Goldfarb*, *supra*, the High Court was faced with a Sherman Act challenge to minimum fee schedules published by a county bar association and enforced by the Virginia State Bar. The state bar was a state agency by law, *id.* 421 U.S. at 789-90, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 586-587, and both lower courts in *Goldfarb* had held that the bar qualified for the "state action" exemption.[5] Without dissent,

[4] The Court was willing to assume that the alleged activities would be illegal if carried out by private persons. 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 325.

[5] In contrast to the state bar, the county bar was a private association which was not a state agency by statute and which received no active state supervision. The district court, 355 F.Supp. 491 (E.D.Va. 1973), held that the county bar was subject to the antitrust laws. The Court of Appeals, 497 F.2d 1 (4th Cir. 1974), agreed that the county bar was not covered by the "state action" exemption. However, its activities were seen as falling within a "learned profession" exemption to the Sherman Act, and as having an insufficient impact upon interstate commerce. Since the county bar, unlike the state bar in *Goldfarb*, and unlike the Cities in the present case, was not a governmental entity, the Supreme Court's disposition of its contentions will not be discussed here.

the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislature grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.[8] A district judge's inquiry on this point should

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ently have found an exemption if the Supreme Court of Virginia, acting within the intended scope of its legislative grant, had established minimum fees. See 421 U.S. at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. See also note 8, *infra*.

[8] Our resolution of these general issues is in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster*, *supra*, 521 F.2d at 1279-80. We have carefully studied the authorities cited by plaintiffs and have found nothing that directly contradicts the position which we take in this case. Unlike *Duke & Co.* and the present case, none of these decisions dealt with municipalities. Almost all of them are pre-*Goldfarb*. To the extent that *State of New Mexico* v. *American Petrofina*, 501 F.2d 363 (9th Cir. 1974) might be read as extending the "state action" exemption to lower governmental bodies' activities which were not contemplated by the legislature, we must regard it as in conflict with the Supreme Court's later decision in *Goldfarb*.

Brief mention should be made of plaintiffs' argument that a decision such as this will lead to undesirable variations in the application of the antitrust laws, since the governmental activities subject to the *Parker-Goldfarb* exemption will differ from state to state. We regard this as an inevitable result of the emphasis in *Parker* and *Goldfarb* upon the scope of legislative intent. For instance, the *Goldfarb* Court made it clear that a statute specifically establishing minimum fee schedules would lead to a "state action" umbrella. 421 U.S. at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587. Such an emphasis upon what state laws provide will necessarily lead to variations, dependent upon the differing will of state legislatures.

Plaintiffs also draw our attention to the dicta in *Goldfarb* which suggest that the Supreme Court of Virginia could, without new

the Supreme Court rejected this contention. Although the state legislature had authorized the Supreme Court of Virginia to regulate the practice of law, *id.*, at 788, 95 S.Ct. at 2014, 44 L.Ed.2d at 585, that court had taken no action to fix lawyers' fees, *id.* 421 U.S. at 789, 95 S.Ct. at 2014, 44 L.Ed.2d at 586. Nor was there any state statute which directed members of the bar to establish minimum fee schedules. Therefore, the state bar's participation in price fixing failed to satisfy the "threshold inquiry" under *Parker*, i.e., "whether the activity is required by the State acting as sovereign," *id.* at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

Taken together, these two controlling precedents require the following analysis. A subordinate state governmental body[6] is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.[7] Thus, a trial judge may ascertain, from

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[6] Plaintiffs would have us equate cities and states for purposes of determining "state action". No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs. See *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim. Thus, for example, cities, counties, and other state political subdivisions are not considered "the state" for purposes of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 667 n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Fay* v. *Fitzgerald*, 478 F.2d 181, 184 n. 3 (2d Cir. 1973); *Markham* v. *City of Newport News*, 292 F.2d 711, 716-17 (4th Cir. 1961).

[7] The opinion in *Goldfarb* does not support defendant's claim that every alleged anticompetitive activity must be specifically approved by the legislature. Thus, the *Goldfarb* Court would appar-

be broad enough to include all evidence which might show the scope of legislative intent.[9]

III

The Cities argue that a decision adverse to them would necessarily overrule this Court's prior opinion in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). We are reminded of the general rule that one panel cannot overrule the holding of a previous panel of the same court. See *United States* v. *Automobile Club Ins. Co.*, 522 F.2d 1, 3 (5th Cir. 1975). However, we do not regard our decision as irreconcilably inconsistent with that in *Saenz*. The complaint in that case alleged that the director of a state slide rule contest induced a state agency to define its regulations so as to exclude the plaintiff's slide rules from use in the contest. This action allegedly resulted from an unspecified economic tie between the director and a slide rule manufacturer which competed with plaintiff. As the panel noted, *id.* at 1028, the charge of an economic relationship between the director and the rival manufacturer was entitled to no weight since plaintiff could not simply

statutory authority, impose minimum fee schedules by means of court rules. *Id.* at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. Our reading of *Goldfarb* is that such rule-making would lead to a "state action" exemption only if the state court's rules fell within the intended scope of its legislative authority "to regulate the practice of law", *id.* 421 U.S. at 788, 95 S.Ct. at 2014, 44 L.Ed. at 586.

As a final point, we cannot accept defendant's invitation to import the discredited proprietary-governmental distinction into this area of the law. This contention is unsupported by authority and is irrelevant under *Parker* and *Goldfarb*, which look only to the scope of the legislative action and not the "proprietary" or "governmental" nature of the subordinate governmental body's conduct.

[9] Therefore, we reject the capricious limitation suggested by counsel at oral argument, which would restrict a court's inquiry to the pertinent statutes themselves.

rely on his pleadings in the face of opposing affidavits. Stripped of the unsupported charge of financial influence, the allegations in *Saenz* must be seen as having stated no more than that (a) the director, "clearly acting within the scope of his duties," *id.* at 1028, determined that plaintiff's slide rule was not a "standard slide rule" which could be employed in the contest, and (b) the agency ratified that decision. It can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university system (of which the agency was a part) by the Texas legislature. The *Parker-Goldfarb* principle, as we have interpreted it, would clearly exempt such actions from the Sherman Act. We are, therefore, unpersuaded that there is any necessary conflict between our decision and the panel opinion in *Saenz*.

Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis* v. *Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*. The test now is whether the challenged action is the type of activity which the legislature intended the governmental body to perform. This principle has already been tacitly recognized by one post-*Goldfarb* panel of this Court. Faced with an antitrust challenge to a city council's rate-making practices, the panel in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) was not content merely to note that the actor was a municipal body. Rather, the Court went on to ascertain that the state legislature had expressly delegated ratemaking au-

thority to municipalities, *id.* at 1133. The legislature had also specifically charged municipalities with the duty of insuring a fair rate structure. The *Jeffrey* panel was unwilling to assume that the city council was doing anything other than carrying out this legislatively mandated duty when it took the actions complained of. *Id.* It will be observed that this is precisely the type of inquiry which our reading of *Goldfarb* and *Parker* would require. In our view, *Jeffrey* at least implicitly adopted the analysis which we have expressly employed today. The *Jeffrey* opinion, then, lends further support to our conclusion that, in the wake of *Goldfarb*, plaintiffs' interpretation of *Saenz* cannot be considered the law of this circuit.[10]

IV

To summarize, we conclude that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws. Upon remand, the court must determine whether the activities alleged fall within the intended scope of the powers granted to the Cities by the legislature. In their briefs on appeal, the Cities have provided copies of statutes which allegedly comprehend the acts involved in Power & Light's counterclaim. These are materials which should be submitted to the trial court in the first instance, together with all other relevant evidence.

REVERSED AND REMANDED, with directions.

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[10] We are also unpersuaded by plaintiffs' reliance upon *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968). The various exemptions perceived by the *Alabama Power* panel were expressly derived from a judicial construction of the Rural Electrification Act in an antitrust context. No such problem of reconciling various federal statutes with one another is presented in the current appeal.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. C. Docket No. CA-73-1970 "E"

[TITLE OMITTED IN PRINTING]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1976

Issued at Mandate: Oct. 18, 1976

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

Petition of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Rehearing en Banc

On May 27, 1976, a panel of this Court (Morgan, Clark and Tjoflat, Circuit Judges) rendered an opinion in this case which reversed and remanded, with directions, a judgment of the United States District Court for the Eastern District of Louisiana (Cassibry, J.). In so ruling the panel interpreted the Supreme Court's recent decision

in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) to require a departure from the holding in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) which the district court below had viewed as the controlling law in this Circuit relating to the applicability of the federal antitrust laws to the acts of the states and their political subdivisions.

The Appellees, the City of Lafayette, Louisiana, and the City of Plaquemine, Louisiana (Cities), hereby petition this Court, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 12 of the Local Rules of the United States Court of Appeals for the Fifth Circuit, for a rehearing of this appeal, *en banc*. The basis for this petition is the Cities' contention that the panel in its decision (by Tjoflat, Circuit Judge) has misapprehended the Supreme Court's opinion in *Goldfarb* v. *Virginia State Bar, supra,* and, as a result, has improperly and wrongly overruled this Court's prior decision in *Saenz, supra.*

Statement of the Case

As more fully stated in the Brief of the Appellees, (at pages 1-3) this is an appeal by Louisiana Power & Light Company (LP&L) from the district court's dismissal of LP&L's amended counterclaim which charged that the Cities had violated provisions of the federal antitrust laws, 15 U.S.C. § 1 *et seq.*, in the operation of their municipal electric utility systems.[1] In its decision the district court relied directly upon *Parker* v. *Brown*, 317 U.S. 341 (1943) and this Court's decision in *Saenz* to hold that the actions of these political subdivisions of the State of Louisiana were not subject to the strictures of the federal antitrust laws (Appendix pp. 54-59)

[1] The principal action, a damage suit by the Cities charging, *inter alia*, that LP&L and other investor owned utilities operating in Louisiana have combined and conspired to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, is presently pending in the district court.

Argument

I. The Court's Opinion Misapprehends the Goldfarb Decision

The position of the Cities is that they are not subject to federal antitrust liability in the operation of their municipal electric utility systems under the *Parker* v. *Brown* doctrine.[2] *Parker* v. *Brown* held that the Congress in passing the Sherman Act did not intend to include "state action or official action directed by the state" within the Act's prohibitons. 317 U.S. at 351. This Court rejected the Cities' position on the basis of its interpretation of the *Goldfarb* decision, a case which was discussed at length in the briefs of both parties and during oral argument. In *Goldfarb* the Supreme Court was reviewing an antitrust challenge by a homeowner to the minimum fee schedule established by a county bar association for real estate title examinations. Also named as a defendant was the Virginia State Bar, the alleged enforcer of the fee schedule. In the Court of Appeals the Virginia State Bar had been successful in arguing that under the *Parker* v. *Brown* doctrine, as an agent of the state, it was not subject to the Sherman Act. The *Goldfarb* Court reaffirmed the *Parker* v. *Brown* doctrine that the Sherman Act "was intended to regulate private practices and not to prohibit a State from

[2] As the Cities stated in their Brief and in oral argument, sanctions may obtain either in state court or in the political arena for abuses of authority by public bodies. The question here is not whether the Cities may operate without restraint, but whether Congress intended the specific provisions of the federal antitrust laws to reach the actions of states and their political subdivisions. It is the Cities' contention that the Sherman Act is, and should be, "a prohibitation of individual not state action." *Parker* v. *Brown, supra,* at p. 352. It should also be noted that even though the acts of governmental entities are not covered by the Sherman Act's prohibitions, restraints upon interstate commerce by such bodies may be subject to attack in federal court under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3.

imposing a restraint as an act of government." (421 U.S. at 788) The Court, however, rejected the Virginia State Bar's attempt to avail itself of state action protection because it found that this organization of *private* attorneys although "a state agency for some limited purposes . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." (421 U.S. at 791-792) With relation to the alleged conduct, the Virginia State Bar was acting not as an agent of the State, but in the pecuniary interests of its private members.

Nevertheless, this Court viewed the Virginia State Bar as "a state agency by law" (Opinion at page 3647), considered it an unqualifiedly governmental institution and equated it with the Cities, which are political subdivisions of the State of Louisiana.[3] The Cities view this interpretation of *Goldfarb*, which is the basis for the Court's decision, to be in error, and the Court's pronouncement that "[t]he argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*" (Opinion at page 3649) to be an unwarranted and inappropriate expansion of the

[3] Footnote 6 of the Court's opinion states that the Cities have provided no authority for the proposition that the Cities are the equivalent of the State of Louisiana for the purposes of determining "state action". To the contrary, the Cities cited and provided in the Addendum to their Brief the Louisiana constitutional and statutory provisions which created the Cities as political subdivisions of the state and delegated the Cities plenary authority to own, operate and govern the conduct of their municipal electric utility systems. Under such delegations these state governmental bodies operate with the full authority of the State of Louisiana. Additionally, the Court in *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974) saw no distinction between the state and its political subdivisions in applying the *Parker* v. *Brown* doctrine, *see* 501 F. 2d at 370, n. 15.

holding in *Goldfarb*.[4] Such a reading of *Goldfarb* would seriously and unnecessarily erode the *Parker* v. *Brown* doctrine. It would make government subject to the Sherman Act, a proposition which the Supreme Court expressly noted in *Parker* v. *Brown* that Congress had rejected. 317 U.S. at 351.[5] Quite simply, *Goldfarb* did not address the present situation where an unquestioned state governmental entity is the alleged violator. The private character of the Virginia State Bar and its actions are critical to the *Goldfarb* decision. This Court erred when it failed to recognize those facts and ruled on the basis of *Goldfarb* that the Cities are subject to suit under the federal antitrust laws.

In its May 27, 1976 decision this Court makes only passing reference to *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974). (*See* Opinion p. 3648, n.8) In *New Mexico*, the State, on behalf of itself and all other public bodies in the State, brought an action alleging violations of the federal antitrust laws by suppliers of asphalt. One of the defendants filed an antitrust counterclaim against the State and its political subdivisions charging a conspiracy between them in the purchase of asphalt. Following *Parker* v. *Brown*, the Ninth Circuit affirmed the dismissal

[4] The Supreme Court has itself often warned against extending its rulings beyond the facts of the case in which they were presented. *See Cohens* v. *Virginia*, 19 U.S. 264 (1821); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *United States* v. *Nerfert-White Co.*, 390 U.S. 228, 231 (1968).

[5] The Cities' Brief at pages 4-11 discusses at some length the body of case law which supports the conclusion that the Sherman Act is not applicable where the alleged violator is truly a state or a state government entity. With the exception of *Saenz* v. *University Interscholastic League, supra*, and *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974), the Court's opinion in this case does not deal with these cases. It was apparently the Court's view that these decisions were not relevant under its interpretation of *Goldfarb*.

of the counterclaim. The *New Mexico* Court held the Sherman Act was not intended to apply to the activities of a state. Where the state and its political subdivisions were the alleged actors the court found no necessity to review any "legislative mandate." The court stated that "there is no indication . . . that the legislature must declare its intent to supplant competition in an industry when there is no question that the conduct is committed by the state." 501 F.2d at 369-370. *New Mexico* is, therefore, in direct conflict with the Court's decision here. The Court's declination to follow *New Mexico* is, however, based solely upon its erroneous interpretation that *Goldfarb* dealt with the actions of a state governmental entity. As we noted above the element of private precuniary interest was critical in *Goldfarb*.

Even more importantly for the purpose of this petition, the Court used its interpretation of *Goldfarb* as its rationale for avoiding this Circuit's 1973 holding in *Saenz*. In *Saenz*, the Court ruled that the University Interscholastic League was a part of the University of Texas and "a governmental entity outside the ambit of the Sherman Act" and repeated the doctrine established under *Parker* v. *Brown* that . . . "it is well settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." 487 F.2d at 1028. In *Saenz* the Court properly required no inquiry into the scope of authority granted this bureau of the Extension Division of the University of Texas. The Court was satisfied with the lower court's determination that the bureau was a "governmental entity." See 487 F.2d at 1027.

As an alternative to a complete repudiation of *Saenz* on the strength of its interpretation of *Goldfarb*, the Court's opinion here attempts a difficult reconciliation. This is done by concluding that "[i]t can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university

system (of which the agency was a part) by the Texas legislature." (Opinion at page 3649) The Cities respectfully note that the *Saenz* opinion contains no analysis of the powers conferred upon the University of Texas by the Texas legislature, and whether or not the agency's conduct was within the legislative intent or even contemplated by the legislature is matter for conjecture only and certainly open to some doubt.

It appears, therefore, that the Court must look to *Goldfarb* alone as its basis for avoiding the holding of *Saenz*. And, as we have stated, the *Goldfarb* opinion rests upon facts so distinguishable from those now before the Court as to raise serious questions as to the propriety of the Court's current departure from established law.

Additional support for the Cities argument that *Goldfarb* does not conflict with *New Mexico* or *Saenz* may be found in *United States* v. *Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974). The *Oregon State Bar* case was an antitrust challenge to a minimum fee schedule involving facts nearly identical to those in the *Goldfarb* case. In both Virginia and Oregon the state bar is an association of private attorneys invested with limited duties by the state. *Oregon State Bar* was decided in the Ninth Circuit after that Circuit's ruling in *New Mexico*. The Oregon district court found no conflict between the *New Mexico* decision and its own ruling, which was prophetic of the later *Goldfarb* decision, that the State Bar's fee setting activity was subject to scrutiny under the Sherman Act.

The court in *Oregon State Bar* correctly viewed *New Mexico* as holding that "if a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine." 385 F. Supp. at 510. The Oregon district court accepted the distinction which the Cities urge here—the distinction between an association of private

attorneys with limited state authority and the state or its political subdivisions—and ruled that a legislative mandate test must be applied to determine whether state action is involved where the alleged violator *is not* the state. *See* 385 F. Supp. at 511. Under such an analysis it is evident that *Goldfarb* is not in conflict with either *New Mexico* or *Saenz*.[6] Likewise, in the instant case, *Goldfarb* does not require reversal of the district court's action.

II. Reversal of the District Court Requires an En Banc Decision by This Court

The Court in its opinion acknowledged the established Fifth Circuit rule that one panel cannot overrule the holding of a previous panel of the same court. The Cities had in their Brief reminded the Court that "a panel of this Court cannot overrule a prior decision of the Circuit, *en banc* consideration being required". *United States* v. *Lewis*, 475 F. 2d 571, 574 (5th Cir. 1972).[7] The Cities retain their conviction that, in view of the holding in *Saenz*, an *en banc* decision is necessary if this Court is properly to reverse the decision of Judge Cassibry in the district court.

The Court's opinion, however, seeks to avoid this requirement of an *en banc* determination with a two part

[6] In their Brief the Cities provide a structure for reconciling the various factual circumstances which give rise to *Parker* v. *Brown* issues and analyzing the legal standards to be applied. (See Appellees Brief at pages 18-24). This discussion illustrates the basis for applying varied tests depending upon the degree of private involvement in the alleged anticompetitive conduct.

[7] *See also, United States* v. *Automobile Club Ins. Co.*, 522 F. 2d 1 (5th Cir. 1975); *Puckett* v. *Commissioner of Internal Revenue*, 522 F. 2d 1385 (5th Cir. 1975); *Lineberry* v. *United States*, 512 F. 2d 510 (5th Cir. 1975); *United States* v. *Bailey*, 468 F. 2d 652 (5th Cir. 1972); *United States* v. *Hereden*, 464 F. 2d 611 (5th Cir.), *cert. denied*, 409 U.S. 1028 (1972).

analysis. First, the Court states that it does not regard its opinion in this case as irreconcilably inconsistent with *Saenz*. This determination is grounded in the Court's conclusion that the state agency in *Saenz* acted within the scope of a legislative mandate of the State of Texas. As the Cities illuminated above such a conclusion is unsupported by the *Saenz* opini ↵.

Second, the Court, accepting arguendo that *Saenz* held that state governmental bodies are not subject to the Sherman Act, views *Goldfarb* as an intervening Supreme Court precedent which dictates a departure from the holding of *Saenz*. Given the inherent weakness in the Court's first approach, this must, indeed, be the rationale for avoiding the rule requiring *en banc* review. The Cities must repeat their conviction that this determination is erroneous. *Goldfarb* was decided upon facts significantly different from those before this Court. Nothing in the Supreme Court's opinion compels or suggests that its analysis should be extended to include true state governmental entities. Indeed, a fair reading of *Goldfarb* indicates that a different result would have obtained had the Supreme Court of Virginia approved the minimum fee schedule and had it been named as the defendant in that action.

In support of its position that *Goldfarb* represents an intervening Supreme Court decision dictating a departure from *Saenz*, the Court cites *Jeffrey* v. *Southwestern Bell*, 518 F. 2d 1129 (5th Cir. 1975) as tacit recognition by this Circuit that *Goldfarb* requires an examination of legislative intent where the government is the actor. The Court sees *Jeffrey* as its own departure from *Saenz*. *Jeffrey*, however, is a substantially different kind of application of the *Parker* v. *Brown* doctrine. *Jeffrey* was an action between private parties. There residential telephone subscribers sought to challenge certain pricing practices of the telephone company as monopolistic and

in violation of the Sherman Act. The telephone company's defense relied, in part, upon the fact that under state law its rates were regulated by the City of Dallas. The decision of the Court in *Jeffrey*, that such rates were immune from antitrust challenge under the state action doctrine of *Parker* v. *Brown*, was not unique, nor did it depend upon *Goldfarb*. As stated in *Jeffrey*, primary reliance was placed on two previous rate cases in the Circuit, *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F. 2d 672 (5th Cir.), *cert. denied*, 393 U.S. 488 (1968) and *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F. 2d 1135 (5th Cir. 1971). Moreover, *Jeffrey* did not involve allegations of anticompetitive conduct by a governmental body. The City of Dallas was not a defendant and it was not alleged to have violated the federal antitrust laws. Cases such as *Jeffrey*, involving alleged private action, require a different analysis than that necessary where governmental entities are the alleged violators. See, *New Mexico*, *supra*, at 369-70.[8] *Jeffrey* is not in conflict with *Saenz* where the actor-defendant was an agency of the state. Likewise, the *Jeffrey* decision provides no basis for concluding that the Court's opinion in this case may depart from the holding of *Saenz* without consideration by the entire court. Indeed, the Court in *Jeffrey* did not reverse *Saenz or* even imply that its doctrine was no longer the law in this Circuit. The Cities submit that *Goldfarb* is not an intervening Supreme Court decision which dictates a departure from *Saenz* and that the Court's decision in this case must be viewed as overruling a prior panel's holding in derogation of this Court's longstanding rule against such action absent *en banc* consideration.

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[8] The Cities again recommended that the Court review pages 18-24 of their Brief which suggests a conceptual structure for analyzing the various categories of *Parker* v. *Brown* cases. This discussion illustrates the different levels of analysis necessary under varied fact patterns.

III. Public Policy Considerations

This petition has demonstrated two things: (1) that the Court misapprehended the *Goldfarb* decision and erred in its conclusion that *Goldfarb* required reversal of the district court in this case, and (2) that the Court erred in overruling the existing law in this Circuit without an *en banc* determination. In addition, however, attention should be drawn to the Court's apparent lack of concern for the public policy considerations and the practical ramifications attending its action. Although the Cities devoted a section of their Brief to such consideration (*see* Brief at pages 30-31), the Court's opinion is barren of any reflection on the important public policy issues raised by its ruling.

The Court's action in this case will necessarily open the door to antitrust attack aimed at the broad range of activities and services rendered by state and local government. Heretofore, such governmental entities have acted at the behest of their citizenries to provide services in the manner prescribed by local choice. The Court's decision would place the public acts of locally elected officials under the scrutiny of the federal antitrust laws, laws which were enacted for quite a different purpose, to protect against abuses of private economic power. *Parker* v. *Brown*, *supra* at 351; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-93 (1940).

Under the Court's decision general legislative authority to operate municipal electric utility systems, which is present in the instant case, or to provide other city services, such as mass transportation, would leave local governments open to antitrust attack from private interests unless it could be proved that the questioned activity was "clearly within the legislative intent . . . (and) that the legislature contemplated the kind of action complained of." (Opinion at page 3648).

For example, a city with the authority to operate a municipal bus system may well find itself liable for treble damages to a private concern which wishes to but is prevented from establishing a competing busline despite the fact that the local government has determined that duplication of such services would be inefficient and in derogation of the public safety, comfort and welfare. Likewise, a city's grant of a concession or franchise to provide goods or services would be subject to antitrust attack. Disgruntled suppliers, as was the case in *Saenz,* may file, or threaten to file, antitrust charges with some frequency. In such cases the city officials could be charged as co-conspirators and face substantial monetary liability. Even if they are eventually successful in defending such an action the cost of this defense and the chilling effect created would adversely affect the quality of public service.

Grants of legislative authority are generally not made with reference to specific means. Wisely, state legislatures allow their political subdivisions latitude to exercise their specialized judgment as to the manner in which public services are delivered. The choice now will be between overly specific and detailed legislation and the threat of enormous exposure to liability in the federal courts.[9] Congress in enacting the federal antitrust laws never contemplated or intended local governments to be placed in such dilemma. *Parker* v. *Brown, supra,* at 351. The wiser course would be to leave entities of state government free to make their own judgments subject to the protections afforded by state law and the state's own political processes.

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[9] The threat of large damage claims is not an imaginary horrible. At the oral argument in this case, counsel for LP&L announced that it's alleged damages stemming from just one of the four counterclaims were estimated at approximately $500 million. The Cities exposure in this case after trebling could exceed $1.5 billion, an enormous bill for a few thousand taxpayers to meet.

Conclusion

The Cities retain their belief that the Congress did not intend the states and their political subdivisions to be covered by the provisions of the federal antitrust laws and subjected to the potential of treble damage liability for their governmental acts. The Cities respectfully request that this Court grant this petition for rehearing *en banc* in order that this important issue may be presented to the entire Court for its consideration.

Respectfully submitted,

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July 16, 1976

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Re: City of Lafayette, Louisiana and City of Plaquemine, *Louisiana* v. *Louisiana Power & Light Company No. 75-1909*

Dear Sir:

For the second time since the Appellees, the Cities of Lafayette Louisiana and Plaquemine, Louisiana ("Cities"), filed their petition for rehearing of this appeal *en banc*, the Cities are compelled to bring to the Court's attention a recent decision of the Supreme Court relevant to the issue presently before the Court.[1] While we regret presenting these cases in such a piecemeal fashion, we think that these end of term Supreme Court decisions are of critical importance to the Court's deliberation in this case and, therefore, something the Court would want presented.

[1] By letter dated June 25, 1976 the Cities brought the Supreme Court's in *The National League of Cities* v. *Usery*, — U.S. —, 44 U.S. Law Week 4974 (June 24, 1976) to the attention of this Court.

On July 6, 1976 the Supreme Court rendered its decision in *Cantor* v. *The Detroit Edison Company*, — U.S. —, 44 U.S. Law Week 5357. The opinions in *Cantor* shed important new light on the *Parker* v. *Brown* doctrine and the application of the Sherman Act to the actions of state governmental bodies. The plurality opinion of Mr. Justice Stevens (44 U.S.L.W. at 5360-61 and 5363-64), the concurring opinion of Mr. Chief Justice Burger (44 U.S.L.W. at 3564-65), the concurring opinion of Mr. Justice Blackmun (44 U.S.L.W. at 5367 n. 5), and the dissenting opinion of Mr. Justice Stewart (44 U.S.L.W. at 5370 and 5374-75) give strong support for the Cities' position before this Court that its May 27, 1976 opinion in this case misapprehends the Supreme Court's 1975 decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (see, Petition of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Rehearing *En Banc* filed on June 9, 1976).

The opinions in the *Cantor* case clarify two points which are extremely relevant to this appeal and the Cities' request for rehearing. First that the *Goldfarb* case fell outside of the *Parker* v. *Brown* doctrine because the alleged anticompetitive effect was the result of private action and not action by the state or a state governmental entity and second, that *Parker* v. *Brown* held the actions of state governmental bodies and officials to be outside the scope of the scope of the Sherman Act (*see*, 44 U.S.L.W. at 5360-61).

The panel which decided this appeal based its ruling on the intervening authority of *Goldfarb* asserting that the *Goldfarb* legislative mandate test applied to governmental bodies. The *Cantor* decision indicates that the test of Sherman Act applicability turns on who the actors are and confines the *Goldfarb* holding to situations involving private parties. Additionally, the panel's May 27, 1976 determination to avoid the prior law in this Circuit (principally *Saenz* v. *University Interscholastic League*, 487 F. 2d

1026 (5th Cir. 1973)) was based upon the panel's interpretation that Goldfarb modified *Parker* v. *Brown*. The *Cantor* decision makes it clear that such was not the case. In fact, every opinion in Cantor, including the dissent, takes the position that *Parker* v. *Brown* held that state governmental bodies and officials are not subject to the Sherman Act.

We think the *Cantor* decision calls for reversal of the panel in this case. But, at the very least, *Cantor* raises substantial questions as to the propriety of the panel's interpretation of *Parker* v. *Brown* and *Goldfarb* and speaks forcefully in favor of a rehearing of this appeal.

We are enclosing 15 copies of this letter and the attached *Cantor* decision. We would appreciate your distributing these to the Court in aid of its deliberation.

Sincerely yours,

/s/ Jerome A. Hochberg
Jerome A. Hochberg
Attorney for the City of Lafayette, Louisiana and the City of Plaquemine, Louisiana

JAH:llk

cc: Andrew P. Carter, Esq.
Attorney for the Appellant,
Louisiana Power & Light Company

Enclosures [Enclosures not printed]

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
OFFICE OF THE CLERK

October 4, 1976

To All Counsel of Record

No. 75-1909—City of Lafayette, LA and City of Plaquemine, LA v. Louisiana Power & Light Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
/s/ By Susan M. Graves, Deputy Clerk

/smg

cc: Mr. Andrew P. Carter
Mr. Tom F. Phillips
Mr. Jerome A. Hochberg
Mr. Robert C. McDiarmid
Mr. Robert E. Winn

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA, and
CITY OF PLAQUEMINE, LOUISIANA,
Plaintiffs and Appellees,
v.
LOUISIANA POWER & LIGHT COMPANY,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Motion of the Appellees City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Stay of the Issuance of the Mandate Pending Petition for Writ of Certiorari

The Appellees, City of Lafayette, Louisiana and City of Plaquemine, Louisiana ("Cities") hereby move this Court for an order staying the issuance of the mandate in this case for 90 days pending the filing by the Cities of a petition for a writ of certiorari to this Court in the Supreme Court of the United States. This motion is made under the provisions of 28 U.S.C. § 2101(f) and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. In support of this motion the Cities state as follows:

1. That on May 27, 1976 this Court entered judgment and rendered an opinion in this case which reversed and remanded a judgment of the United States District Court for the Eastern District of Louisiana dismissing a counterclaim filed by Louisiana Power & Light Company ("LP&L").

2. That on June 9, 1976 the Cities timely filed a petition for rehearing of the appeal en banc.

3. That on October 4, 1976 this Court entered an order denying the Cities' petition for rehearing.

4. That it is the intention of the Cities to petition the Supreme Court of the United States for a writ of certiorari.

5. That because of the complexity of the issues raised by this appeal, and the current schedule of depositions to be taken in the Cities action against LP&L, the principal action which remains pending in the district court,[1] the preparation of the Cities' petition for a writ of certiorari may require the full 90 days provided by law, 28 U.S.C. § 2101(c).

THEREFORE, the Cities respectfully request that this Court grant the Cities' motion for an order staying the issuance of the mandate in this case for 90 days, or for whatever period the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JEROME A. HOCHBERG
Jerome A. Hochberg
JAMES F. FAIRMAN, JR.
IVOR C. ARMISTEAD, III
ROWLEY & SCOTT
1990 M Street, N.W.
Washington, D. C. 20036
202/293-2170
Attorneys for the Plaintiffs-Appellees

Dated: October 8, 1976

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[1] *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power & Light Company et al.*, Civil Action No. 73-1970, Section E (E.D. La.)

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

Opposition to Motion to Stay Mandate

Louisiana Power & Light Company (LP&L), Appellant herein, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure hereby responds to the Motion of the Appellees, City of Lafayette, Louisiana and City of Plaquemine, Louisiana for a Stay of the Issuance of the Mandate Pending Petition for Writ of Certiorari and opposes said motion for the reasons set forth herein:

1.

No cause has been shown for the stay of ninety days, requested by Appellees, as would be required by Rule 41(b).

2.

Appellees have been on notice of this Court's opinion since May 27, 1976. Appellees have known that the matter decided presents an important issue of principle that would likely be addressed in a petition of writ of certiorari to the Supreme Court in any event. Accordingly they have already had ample time to formulate the argument they would advance to the Supreme Court.

3.

The final order dismissing LP&L's counterclaim against Appellees was entered by the court below in March 1975. LP&L has thus already been delayed in the prosecution of its counterclaim for well over a year.

4.

The complaint now being prosecuted by the Cities of Lafayette and Plaquemine has common issues of law and fact and identity of parties with LP&L's counterclaim.

Further delay may impair the ability of the Court below to proceed with the litigation in an orderly fashion.

For example, in their demand plaintiffs allege that LP&L has engaged in a monopolistic refusal to deal. LP&L will show in defense to that charge that the Cities, not LP&L, engaged in a bad faith refusal to deal. Since the refusal to deal allegation by the Cities was also made in connection with the Cities' numerous other suits in other fora, the issue has a direct bearing upon LP&L's charge that the Cities have engaged in sham and frivolous litigation, knowing that their cause was false.

5.

This matter is before the Court solely on the question of whether LP&L has stated a claim upon which relief may be granted. Even if the Supreme Court were ultimately to disagree with this Court's opinion, plaintiffs would suffer no prejudice by proceedings in the Court below pending that determination. They would be in the same situation as if the Court below had not erroneously dismissed LP&L's counterclaim. It is LP&L that would suffer prejudice if further delay be had.

WHEREFORE, Appellant Louisiana Power & Light Company respectfully prays that this Honorable Court totally deny Appellees' Motion for Stay of Mandate.

Respectfully submitted,

MONROE & LEMANN
ANDREW P. CARTER
W. MALCOLM STEVENSON
WILLIAM T. TETE

By: /s/ ANDREW P. CARTER
1424 Whitney Bank Building
New Orleans, Louisiana 70103

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this 13th day of October, 1976 caused to be mailed, postage prepaid, a copy of the foregoing to counsel of record for each party to this proceeding including Mr. Jerome A. Hochberg, Attorney at Law, 1990 "M" Street, N.W., Washington, D. C. 20036.

/s/ William T. Tete

Dated: October 13, 1976

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-1909

[TITLE OMITTED IN PRINTING]

(Filed: October 18, 1976)

Order

The motion of appellees for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ....., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

NO. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA,
Petitioners,

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Louisiana Power & Light Company (LP&L) respectfully submits that the Court should deny the petition for a writ of certiorari filed by petitioners Lafayette and Plaquemine (Cities).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which petitioners seek to have reversed is reported at 532 F.2d 431. That of the District Court may be found at 1975-1 Trade Cases ¶60,240.

JURISDICTION

This Court does have jurisdiction to entertain the petition under 28 U.S.C.§ 1254(1).

QUESTION PRESENTED

The Court of Appeals accurately stated the sole question

presented as "whether the actions of a city are automatically outside the scope of the federal antitrust laws." (532 F. 2d at 432, Petitioners' Appendix p. 1a.)

Petitioners' statement of the question presented, like their motion to dismiss which led to this proceeding, actually begs the question. There petitioners characterize themselves as "subdivisions of the State." As noted by the Court of Appeals, the Cities "would have us equate cities and states for purposes of determining 'state action'. No authority is cited for this proposition . . . . Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim." (532 F.2d at 434, n. 6, Petitioners' Appendix p. 4a.)

STATEMENT OF THE CASE

Louisiana Power & Light Company's amended counterclaim charges Lafayette and Plaquemine with having violated the antitrust laws. Lafayette and Plaquemine moved for a dismissal of the counterclaim on the grounds they were not bound by the antitrust laws of the United States. The Cities' Rule 12 motion to dismiss and for judgment on the pleadings recited as grounds:

> "...[S]aid Counterclaim charges antitrust law violations which are not applicable to the states or their instrumentalities. The plaintiffs are municipalities, bodies corporate and politic and subdivisions of the State of Louisiana. As such, the Counterclaim, as amended, does not assert a valid claim and should be dismissed."(Record 000045.)

The antitrust violations charged relate to the Cities' ownership and operation of their utility systems.

The United States District Court for the Eastern District of Louisiana dismissed the counterclaim because it felt constrained to do so by its understanding of the decision of the United States Court of Appeals for the Fifth Circuit in *Saenz v. University Interscholastic League*, 487 F. 2d 1026 (5th Cir. 1973). But as the District Court stated at the conclusion of its Reasons for Judgment:

> "The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity: activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state governmental activities are not subject to the requirements of the antitrust laws of the United States."[1] (1975-1 Trade Cases, ¶60,240 at p. 65,950, Petitioners' Appendix p. 13a.)

Between the District Court's reluctant holding, in early 1975, that the antitrust laws did not apply to the Cities even in their conduct of "what is clearly a business activity:

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1. Petitioners take this last sentence out of its context by their description of what the District Court "ruled" (Petition, p. 4). The extra-record reference at the bottom of that page to the role played by the Justice Department in an AEC proceeding is likewise a mischaracterization, apparently intended for some "psychological" effect.

activity in which a profit is realized" and the reinstatement in 1976 of that counterclaim by the United States Court of Appeals for the Fifth Circuit fell *Goldfarb v. Virginia State Bar*, 421 U.S. 773. There this Honorable Court acted to clarify *Parker v. Brown*, 317 U.S. 341. Thus the Court of Appeals noted: "The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the 'state action' doctrine." (532 F.2d at 433, Petitioners' Appendix p. 3a.)

The Court of Appeals responded to the Cities' argument that a decision adverse to them would overrule *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) by saying:

> "Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis v. Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*." (532 F.2d 435, Petitioners' Appendix, p. 7a.)

Therefore, in fidelity to its duty to apply the law of the land as interpreted by the Supreme Court of the United

States, the Court of Appeals reversed and remanded.

ARGUMENT

This Honorable Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, addressed itself directly to the question of "state action" immunity as applied to subordinate state agencies. There the plaintiffs had brought suit against the Virginia State Bar and Fairfax County Bar associations. Plaintiffs alleged the County Bar's adoption of a minimum fee schedule, declared by the State Bar to be an enforceable standard, constituted price-fixing and restraint of trade and commerce in violation of Section 1 of the Sherman Act. The District Court held that minimum fee schedules constituted price-fixing. The District Court also squarely held that the State Bar was immune under *Parker v. Brown* since it acted as an administrative agency of the Supreme Court of Virginia, although it found the County Bar could be held liable because it was a voluntary association of private persons. 355 F. Supp. 491, 495-496. The Court of Appeals for the Fourth Circuit agreed with the District Court that the State Bar was immune under *Parker v. Brown* (and that the *Parker v. Brown* immunity did not apply to the County Bar), but held against plaintiffs on other grounds. 497 F.2d 1. The plaintiffs then took the matter to this Court on petition for writ of certiorari.

This Court reversed the decision that the State Bar was not subject to the antitrust laws:

> "In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that an anticompetitive marketing program which 'derived its authority and its efficacy

from the legislative command of the state' was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. *Id.*, at 350-352; *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904). Respondent State Bar and respondent County Bar both seek to avail themselves of this so-called state-action exemption.

"Through its legislature Virginia has authorized its highest court to regulate the practice of law. That court has adopted ethical codes which deal in part with fees and, far from exercising state power to authorize binding price fixing, explicitly directed lawyers not 'to be controlled' by fee schedules. *The State Bar, a state agency by law,* argues that in issuing fee schedule reports and ethical opinions dealing with the fee schedules it was merely implementing the fee provisions of the ethical codes. The County Bar, although it is a voluntary association and not a state agency, claims that the ethical codes and the activities of the State Bar 'prompted' it to issue fee schedules and thus its actions, too, are state action for Sherman Act purposes.

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S., at 350-352; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). Here we need not in-

quire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. *Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees,* leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action: rather, *anticompetitive activities must be compelled by direction of the State acting as sovereign.*

"The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973). The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially

> a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act. *Parker v. Brown, supra,* at 351-352." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788-791. (Emphasis added, footnotes omitted.)

In *Goldfarb* respondents could point to no state statute requiring their activities. The fact that an entity was a state agency for some purposes did not mean that entity was absolutely immune. If, on the facts of the case, the entity is merely attempting to foster anticompetitive practices for the benefit of those who comprise it, then there may be liability.

In their petition for a writ of certiorari, the Cities predicate their claim for relief on the theory that "the Fifth Circuit misapprehended *Goldfarb* by viewing the challenged activities of the Virginia State Bar as activities of a 'state agency,' (Appendix A, at p. 3a). . . ." (Petition, pp. 8-9.) The exact words of the Court of Appeals to which petitioners refer at the place indicated are: "The state bar was a state agency by law . . . ."(Petitioners' Appendix at p. 3a. 532 F.2d at 433.)

Contrary to petitioners' representation, the characterization of the Virginia State Bar as "a state agency by law" was not error by the United States Court of Appeals for the Fifth Circuit, but rather the very words used by this Honorable Court: "The State Bar, *a state agency by law,* argues that in issuing fee schedule reports and ethical opinions dealing with fee schedules it was merely implementing the fee provisions of the ethical codes." (*Goldfarb,* 421 U.S.

at 789-790, emphasis added.) It was the Fairfax County Bar Association which this Court found, unlike the State Bar, was not a state agency.[2] Thus the County Bar's status was quite different from that of the State Bar, which the Court also described as "the administrative agency through which the Virginia Supreme Court regulates the practice of law in that State...." (*Goldfarb,* 421 U.S. at 776.)

Thus it is plain that petitioners' quarrel lies with this Court's decision in *Goldfarb* rather than with the appellate court's interpretation of *Goldfarb.* In actuality petitioners are asking this Court to reverse what it said in *Goldfarb.*

As pretext for their petition, Cities have seized upon this Court's opinion in *Cantor v. Detroit Edison Co.,*_U.S._, 96 S. Ct. 3110. That case is inapposite: even if *only* state agents were immune under the *Parker v. Brown* rule, it would not follow that *all* state agents were immune, just as it does not follow from the proposition *only* men have hemophilia that *all* men have hemophilia. *Cantor* does not affect the applicability of *Parker* and *Goldfarb* to the instant case, as a brief survey of the three cases shows:

In *Parker v. Brown,* 317 U.S. 341, this Court held that the Sherman Act did not apply to invalidate restraints im-

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2. "The County Bar, although it is a voluntary association and not a state agency, claims that the ethical codes and the activities of the State Bar 'prompted' it to issue fee schedules...." *Goldfarb,* 421 U.S. at 790.

posed by the state *as sovereign:*

> "...We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from *activities directed by its legislature*. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .
>
> * * *
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*" (317 U.S. at 350-352, emphasis added.)

In *Goldfarb* this Court explained:

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the

> Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown* . . . . It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as sovereign*. . . ." 421 U.S. at 790-791.

In *Cantor v. Detroit Edison*, —U.S.—, 96 S. Ct. 3110, 3116 this Court reiterated that *Parker* "held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act." However *Cantor*, unlike *Goldfarb*, did not deal directly with the question of the liability of a state agency.

The petitioners have utterly failed to demonstrate that there is any inconsistency among the Circuits to warrant review of this matter on the bare-bones pleadings that now exist. The analysis of the Fifth Circuit is consistent with *Cantor*, as well as with *Parker* and *Goldfarb*, *i.e.*: "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive constraint." (532 F.2d at 434, Petitioners' Appendix, pp. 4a-5a.)

The analysis given by the Third Circuit in the wake of *Goldfarb* is likewise consistent with the opinions of this Court and with that of the Fifth Circuit. In *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277, 1280 (3rd Cir. 1975) that Court of Appeals reversed the dismissal of three municipal corporations from a private antitrust action. It acted

on the basis of the interpretation of *Parker v. Brown* given by this Court in *Goldfarb*:

> "We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive governmental activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity."

Petitioners rely upon *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) to create the appearance of a conflict between the Ninth and Fifth Circuits. In reality there is no conflict because *American Petrofina* was decided before this Court clarified the law in deciding *Goldfarb*.[3] It must be presumed that the Ninth Circuit, like the Fifth, will do its duty in light of the *Goldfarb* decision and apply this Court's authoritative interpretation of the law. The same may be said of any of the decisions of other circuits, mentioned by petitioners (Petition p. 7, n. 5), which, upon analysis, might prove inconsistent with this Court's subsequent decisions in *Goldfarb* and

3. See also pp. 14-16, *infra*. Of course, the Ninth Circuit itself recognized that its "conclusion that a state (once found indeed to be a state) is not covered by sections 1 and 2 of the Sherman Act is inconsistent with the rationale of *Hecht [v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971)]."

Cantor.[4]

Likewise without merit are petitioners' attempts to have this Court review the Fifth Circuit's decision on the ground that the decision is inconsistent with other decisions of the Fifth Circuit. *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418 (5th Cir. 1976), simply found that it was improper to stay antitrust proceedings under the doctrine of primary jurisdiction for prior reference to an agency of a *Parker* defense raised by a private utility. There was no question in the *Litton* case of the applicability of the antitrust laws to any alleged subordinate state agency. The casual comment in a footnote about which petitioners make much ado is the most *obiter* of *dicta*.[5]

The Cities further represent to this Court that "[t]he United States also takes the position that *Goldfarb* involved 'a private body. . . comprised of persons having a direct financial interest in the subject matter of the anti-

4. An extensive analysis of the pre-*Goldfarb* and *Cantor* cases which petitioners cite would not serve any purpose here, though even an analysis of the old cases fails to support petitioners' position. In addition to cases cited by petitioners, see *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co., Inc. v. Alcoa*, 438 F.2d 1286 (5th Cir. 1971); *Azzaro v. Town of Bradford*, 1974-2 Trade Cases ¶ 75,337 (D. Conn., 1974); *Fox v. James B. Beam Distilling Company*, 1974-2 Trade Cases, ¶ 75,335 (S.D. Ind. 1974); *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974). See also pp. 14-16, *infra*.

5. Footnote 8 merely makes reference in a couple of sentences to certain views expressed by Professor Handler. See also Handler, *Twenty-Fourth Annual Antitrust Review*, 72 *Columbia Law Review* 1, 18 (1972). For the Fifth Circuit's application of *Parker v. Brown* as interpreted by *Goldfarb*, see also *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975).

competitive restraint' and distinguishes *Goldfarb* from a situation where an agency of state government is itself charged with violations of the federal antitrust laws. Brief of the United States as Amicus Curiae at 18, *Bates v. State Bar of Arizona, supra.*" (Petition, p. 9, n. 6.) The deletion made by Cities from the Government's brief, indicated above, is of the crucial words "that is a 'state agency' only for limited purposes". (Brief of United States in *Bates*, p. 18.)

The true position that the United States takes with respect to *Goldfarb* is spelled out in a matter that first came before this Court last term as *Texas State Board of Accountancy v. United States of America*, No. 75-531, *cert. den.* December 15, 1975. There this Court refused to grant certiorari in a case where the United States Court of Appeals had overturned[6] the quashing,[7] on the grounds of *Parker v. Brown*, of a civil investigative demand by the Justice Department to a state agency.

Subsequently, the United States filed a civil suit against the same state agency and, in the Government's Brief in Opposition to Defendant's Motion to Dismiss (predicated on *Parker v. Brown*), stated:

> "Defendant asserts that it 'is a state agency and the action challenged is the action of the state, itself, mandated by statute.' [*Memorandum in*

6. *Texas State Board of Public Accountancy v. United States*, 5th Cir., No. 75-2626, Motion for Summary Reversal by United States, *granted* August 11, 1975.

7. *Texas State Board of Public Accountancy v. United States*, Civil Action No. A-74-CA-270, Memorandum Opinion and Order (W.D. Tex., April 16, 1975).

Support of Motion to Dismiss, page 7.] The types of broad legal generalizations that defendant espouses to justify its 'state action' immunity claim are indeed tempting. They have been repeatedly rejected. Vague phrases like 'official action,' 'legislative mandate,' and 'state agency' are simply not sufficiently self-defining to permit automatic conclusions, particularly as to so serious a matter as antitrust immunity. As the Court of Appeals for the Fifth Circuit has pointed out, '[t]he concept of state action is not susceptible to rigid, bright-line rules.' *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438F.2d 1286, 1294 (1971),*cert. denied*, 404 U.S. 1047 (1972). Thus, if anything is clear regarding 'state action' immunity claims, it is that a hard, close examination of the facts is necessary before particularized legal conclusions can be drawn in any case. Only where there is *no doubt* that the defendant is the State itself can the inquiry be quickly ended, *see New Mexico v. American Petrofina*, 501 F.2d 363, 370 (9th Cir. 1974). The factual exposition in *Parker* strongly indicates the need for close scrutiny, as do the Supreme Court's factual examinations in the two most significant decisions on the 'state action' immunity issue since *Parker*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976).

> "In particular, it is clear that simply because a defendant is considered an 'instrumentality' of the state [*See* United States v. Oregon State Bar, 385 F. Supp. 507, 511 (D. Ore. 1974).] or a 'state

agency for limited purposes,' [*See* Goldfarb v. Virginia State Bar, *supra*, 421 U.S. at 791.] or indeed any 'subordinate state governmental body,' [*See* City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976).] it is not, in the words of the Fifth Circuit, *'ipso facto'* exempt from the operation of the antitrust laws. [*Id.*] . . . ." Government's Brief in Opposition to Defendant's Motion to Dismiss, pp. 7-8 (footnotes raised to text by brackets) filed February 2, 1977 in *United States v. Texas State Board of Public Accountancy,* Civil Action No. A-76-CA-219 (W.D. Tex.).

In sum, it is clear under *Goldfarb* that an entity, there described by this Court as a "state agency by law"[8] described by the Fifth Circuit as a "state agency by law"[9] and as a "subordinate state governmental body",[10] described by the United States in its *Bates* brief as a " 'state agency' only for limited purposes"[11] is not, as petitioners would have it, *ipso facto* exempt under *Parker v. Brown*. Under Louisiana law petitioners are precisely such an entity as described:

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8. 421 U.S. at 789-790.

9. 532 F.2d at 433.

10. *Id.*, 434.

11. Brief of the United States as Amicus Curiae, p. 18, *Bates v. State Bar of Arizona,* No. 76-316.

"A municipal corporation . . . is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated and not common to the State or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two classes of powers and two classes of rights - public and private. In all that relates to one class it is merely the agent of the State and subject to its control; *in the other it is the agent of the inhabitants of the place - the corporators - maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator." New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478, 481 (1874) (Emphasis added.)

Moreover, in the activity at issue here, the operation of municipal utility systems, it is clear that petitioners neither act as sovereign nor by command of sovereign to be anti-competitive:

> "In this state a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation. See *Vicksburg, S. & P. Railway Co. v. City of Monroe*, 1927, 164 La. 1033, 115 So. 136, supra." *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 892; 112 So.2d 635, 650 (1959).

These rules include those of the antitrust law. Louisiana law exacts compliance with the principles and policies of the antitrust laws. Not only does the state have its own antitrust statute, La. R.S. 51:121, *et seq.*, but both State and Federal antitrust laws must be deemed part of the

"restrictions imposed by general law for the protection of other communities" which municipalities are bound under La. R.S. 33:621 to observe in the operation of their utility systems.

When one strips away petitioners' erroneous legal verbiage, all that remains is a naked policy argument that municipal corporations, even when engaged in profit-making business, should not be bound by the antitrust laws. Petitioners have shown no reason why they should enjoy such a privileged status. They wish to hold their competitors to the standards of the antitrust laws, but to be free of those standards in their own business conduct. However, the consumer is as much injured by anticompetitive conduct of a municipal corporation engaging in business for a profit as by the same conduct performed by a private business corporation. As shown above, petitioners' preferences as to policy are not those adopted by the State of Louisiana through its Legislature.

CONCLUSION

For the foregoing reasons Louisiana Power & Light Company respectfully prays that the petition of Lafayette and Plaquemine for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew P. Carter, Attorney for the Respondent, do hereby certify that I have served the Petitioners with three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same in a properly addressed envelope with proper postage prepaid to Jerome A. Hochberg, Esq., 1990 M Street, N.W., Washington, D. C., attorney of record for Petitioners.

This the ___ day of March, 1977.

MONROE & LEMANN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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("Cities") contend that such an interpretation of *Goldfarb* is erroneous. The Virginia State bar is an organization of private attorneys that "voluntarily joined in what is essentially a private anti-competitive activity," 421 U.S. at 792. Thus, for the purpose of applying the federal antitrust laws, a critical distinction exists between the Virginia State Bar and the Cities. The Cities submit that they, as municipal governments, are different from bar associations and are not covered by the ruling in *Goldfarb*. LP&L's argument on the merits advances the "other side" of this issue, but does not detract from the importance of the issue, the crying need for resolution of the issue or the arguments presented by the Cities in favor of granting the writ.

LP&L urges that *Goldfarb,* as an intervening decision, minimizes the conflict between the circuits with regard to the application of the federal antitrust laws to cities. If, however, the Court agrees with the Cities that there is a distinction under the state action doctrine [1] between constitutionally created state political subdivisions and bar associations composed of private competing attorneys, LP&L's "boot strap" argument fails, and the direct conflict between the Fifth Circuit here and the Ninth Circuit in *New Mexico* v. *America Petrofina, Inc.,* 501 F. 2d 363 (9th Cir. 1974) remains undiminished.

2. LP&L's Secondary Argument Is Not Germane to the Petition.

In the final few paragraphs of its Brief in Opposition LP&L interjects an extraneous concept into its argument. LP&L makes the claim that the Cities, by providing electric utility services, are engaged in "business for profit," are not functioning as state governmental entities and, therefore, should not be afforded "privileged legal status." [2]

[1] *Parker* v. *Brown,* 317 U.S. 341 (1943).

This argument, the old and discredited proprietary-governmental distinction, which LP&L also advanced below, was summarily rejected by the Fifth Circuit as irrelevant to analysis under *Goldfarb* and *Parker* v. *Brown* (532 F. 2d 431, 434 n. 8, Appendix A to the Petition at p. 6a). Use of the proprietary-governmental distinction in applying federal law was rejected by this Court in *Indian Towing Company* v. *United States,* 350 U.S. 61, 65 (1955) where Mr. Justice Frankfurter warned that the federal courts should not enter into "the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." The distinction is in any case illusory. "[I]t is hard to think of any governmental activity . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been or could not conceivably be, privately performed." 350 U.S. at 68. The concept that municipalities are both part time governments and part time private enterprises tortures reality.

Moreover, LP&L's allegations of "profit-making" by the Cities is an illusion of semantics. The Cities unquestionably are not operated for profit, they are public bodies. Plainly, any surplus revenues received by the Cities, be they as a result of their providing electric services or the collection of traffic fines, merely go to defray other municipal expenses in lieu of additional taxation. There are no shareholders to receive cash dividends, the City officials involved, both

[2] Brief in Opposition at page 18.

elected and appointed, receive no bonuses or stock options and no assertion of LP&L can turn these Cities into private business enterprises which are subject to liability under the federal antitrust laws.

CONCLUSION

The Cities repeat their request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*,

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent*.

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v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent*.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. p. 51)[1] is reported at 532 F.2d 431. The opinion of the United States District Court for the Eastern District of Louisiana (App. p. 44) is reported at 1975-1 CCH Trade Cases ¶ 60,240.

JURISDICTION

The judgment of the court of appeals (App. p. 59) was entered on May 27, 1976. On June 9, 1976 the City of Lafayette, Louisiana and the City of Plaque-

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[1] "App." references are to pages of the Appendix filed with this Court pursuant to Rule 36.

mine, Louisiana (hereinafter "Cities") timely filed a petition for rehearing *en banc*. (App. p. 59). The court of appeals entered an order denying the Cities' petition for rehearing on October 4, 1976. (App. p. 75). The Cities' petition for a writ of certiorari was filed on December 22, 1976. The petition was granted on March 28, 1977. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

At issue is the intended scope of the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1, 2 and Section 3 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §14. (These statutory provisions are printed in the Addendum to this Brief).

QUESTION PRESENTED

The question presented is whether city governments, political subdivisions of a state, are subject to causes of action and treble damage liability under the federal antitrust laws. (15 U.S.C. §1 *et. seq.*)

STATEMENT OF THE CASE

The issue before this Court arises from the district court's dismissal of an amended counterclaim filed by the respondent Louisiana Power & Light Company (hereinafter "LP&L") in *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power & Light Company et al.* Civil Action No. 73-1970, Section "E" (E.D.La.), an action filed by the Cities on July 24, 1973. The Cities' complaint (App. p. 6) alleged that LP&L combined and conspired with other privately owned utilities to restrain and monopolize interstate commerce in the generation, transmission and sale of electric power and energy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

The counterclaim in turn alleged that the Cities violated the federal antitrust laws in the operation of their municipal electric utility systems.[2] Four separate allegations are contained in the counterclaim as amended: that the Cities engaged in sham and frivolous litigation against LP&L before several federal regulatory agencies, the United States Department of Justice and the federal courts in connection with LP&L's planned construction of a nuclear electric generating facility (App. pp. 19, 24-25); that the Cities each included in their municipal utility bonds covenants with the bondholders to exclude competition from other utilities in the provision of electric power and energy within their municipal boundaries

[2] The Cities as political subdivisions of the State of Louisiana are empowered by the Constitution of the State of Louisiana to exercise any governmental power not inconsistent with the state constitution and not denied by their charter or by general laws. *See*, Article VI, Section 7(a) of the Constitution of the State of Louisiana. (*See*, Article XIV, Section 40(d) of the constitution in effect prior to January 1, 1975.) Further, a Louisiana statute provides that cities may "acquire by condemnation or otherwise, construct, own, lease and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities." Louisiana Acts 1918, No. 160, §3 (LSA-RS 33:621); *See also*, LSA-RS 33:1326, 4162, 4163. These constitutional and statutory provisions are set forth in the Addendum to this Brief.

(App. p. 19); that the Cities had agreed with others for the provision of electric power and energy in their market areas for a term longer than that lawful under state law in an attempt to exclude competition in such markets (App. p. 19); and that the City of Plaquemine contracted with certain customers to provide water and gas service on the condition that such customers also purchase electricity from the City. (App. p. 33). LP&L alleged that its damages resulting from the Cities' conduct exceed $180 million. (App. p. 20).

On March 3, 1975 the district court, citing *Parker* v. *Brown,* 317 U.S. 341 (1943), ruled that the Cities engaging in "purely state government activities are not subject to the requirements of the antitrust laws of the United States," (App. p. 48), and dismissed LP&L's amended counterclaim. Final judgment on LP&L's amended counterclaim was entered pursuant to Rule 54(b), Fed. R. Civ. P., on March 13, 1975 (App. p. 48), and an appeal was taken by LP&L to the Fifth Circuit. (App. p. 49).

In an opinion dated May 27, 1976, (App. p. 51) the Fifth Circuit relied upon its interpretation of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), to hold "that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws." (App. p. 58). It ruled that state governmental bodies, to avoid antitrust liability, must show that the state legislature in granting authority to the governmental bodies specifically contemplated the alleged anticompetitive restraint and that "the challenged activity was clearly within the legislative intent." (App. p. 54). On

October 4, 1976 the court of appeals denied without comment the Cities' petition for rehearing *en banc.* (App. p. 75).

SUMMARY OF ARGUMENT

This Court in *Parker* v. *Brown,* 317 U.S. 341 (1943), held that the Sherman Act does not apply to state government. It found that the Sherman Act was aimed at private anticompetitive conduct, and concluded that Congress did not intend to prohibit actions of a state. Despite *Parker's* firm conclusions as to the scope of Sherman Act coverage, the Fifth Circuit, relying upon *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), ruled that the Cities, political subdivisions of the State of Louisiana, are susceptible to a suit for treble damages under the antitrust laws. This ruling fails to recognize the critical distinction between *Goldfarb* and this action. *Goldfarb* involved actions by an organization of private attorneys which had been given only limited state functions, and did not purport to rule that wholly governmental state bodies, such as municipalities, are subject to prosecution under the federal antitrust laws.

This Court's later decision in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), demonstrates that *Goldfarb* did not retreat from *Parker's* conclusion that the Sherman Act does not apply to state government. Moreover, since a city is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions.

Indeed, the Ninth Circuit so held in *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

Under the Fifth Circuit's ruling, the Cities will be subject to antitrust liability unless they can prove that the state legislature authorized and intended their specific conduct. This "legislative mandate" test and the confusion it will cause illustrates the propriety of *Parker's* conclusion and the wisdom of excluding municipalities from the application of the antitrust laws. A test of this nature is appropriate to determine the degree of governmental compulsion when private interests are involved. But truly governmental bodies operating under the direction of elected public officials present no question of private interests seeking immunity or masquerading under the banner of state action. It makes no sense to determine whether the state has compelled itself to engage in the challenged activities. In *New Mexico*, the court specifically held the legislative mandate test was unnecessary where there is no doubt that the defendant is a state governmental body.

A legislative mandate test will create great uncertainty in state and local government. In most instances state legislatures delegate power and authority to subordinate state bodies in general terms. This is done to provide local government with the flexibility necessary to accommodate local needs and unforeseen events. The legislative mandate test will either require the states to redraft their delegations of authority in specific and limiting terms or leave local officials uncertain as to whether their activities may be subject to antitrust attack.

Beyond the problems which will be caused by the vagaries of the Fifth Circuit's standard, inestimable disruption of local government will result if the federal antitrust laws are applied to municipal governments. Local governments provide a broad range of services, all of which will be subject to antitrust attack. The threat of such suits with their high costs and possible treble damage judgments will have a chilling effect upon local decision making and paralyze the functions of local government.

Both the Fifth Circuit's holding, and LP&L's argument that the Cities should be treated like private corporations for antitrust purposes, ignore the express purposes of the antitrust laws and the fundamental differences between private and public bodies. Governmental entities operate in the public interest, not for private gain, and their officials are subject to removal from office if their actions do not meet the expectations of the electorate. The federal antitrust laws with their unique remedies were designed to protect the public from abuses of private economic power and are plainly unsuited to resolve disputes over the propriety of local governmental action.

ARGUMENT

1. The Federal Antitrust Laws Are Inapplicable To Municipal Governments.

A. *Parker* Found That Direct Governmental Action Was Not Subject To The Antitrust Laws, and *Goldfarb* Did Not Alter That Finding.

This case directly raises the question whether Congress intended the federal antitrust laws to apply

to the actions of state political subdivisions. Although this precise question has not heretofore been addressed by this Court, the issue is among those embraced by the state action doctrine articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943).[3]

In *Parker* v. *Brown* the Court undertook to examine the Sherman Act and its legislative history to determine whether the Congress intended the Act to apply to the states and restrain them in the exercise of their governmental authority. In so doing, the Court found that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action," and that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history." 317 U.S. at 351. The Court concluded, as it had before,[4] that the purpose of the Sherman Act was "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations" (317 U.S. at 351) and "must be taken as a prohibition of

[3] The issue is not one of immunity from the antitrust laws, nor is it whether the federal statutes supersede or preempt the acts of state governmental bodies. Rather, as is evident from the *Parker* v. *Brown* decision itself, the question is whether Congress intended to apply the antitrust laws to state action at all. 317 U.S. at 350-352. *See also, E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine*, 76 Colum.L.Rev. 1, 9-10 (1976).

[4] *See, Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-93 (1940); *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 50 (1911).

individual and not state action." 317 U.S. at 352.[5] The clear message of *Parker*, then, is that Congress enacted the Sherman Act to outlaw anticompetitive conduct by private parties, not to interfere with government.

Notwithstanding *Parker's* strong restatements of congressional purpose, the Fifth Circuit ruled in this case that the federal antitrust laws can be applied to municipal governments, and that such political subdivisions of the state are subject to private suits seeking treble damages.[6] This ruling, a departure by the court of appeals from its previous decision in *Saenz* v. *University Interscholastic League*, 487 F.2d

[5] The Court repeated this position in *Eastern Rail. Pres. Conf.* v. *Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961) where, referring to *Parker*, Mr. Justice Black stated: "Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136. (footnote omitted).

[6] In addition to allegations of Sherman Act violations by the Cities, LP&L's counterclaim, as amended, contains allegations that the City of Plaquemine violated Section 3 of the Clayton Act, 15 U.S.C. § 14. There is no basis for reaching a different conclusion regarding the Clayton Act's inclusion *vel non* of state governmental action within its prohibitions. The legislative history of the Clayton Act is similarly void of any intention to include state action. No distinction between the two Acts is drawn in *Cantor* v. *Detroit Edison Co., infra*, the only relevant case decided by this Court which included allegations under both Acts. And, in *Alabama Power Co.* v. *Alabama Electric Power Cooperative Inc.*, 394 F. 2d 672 (5th Cir.), *cert. denied*, 393 U.S. 100 (1968), the circuit court considered it "settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." 394 F. 2d at 675.

1026 (5th Cir. 1973),[7] was based squarely upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), which the Fifth Circuit read to "require" its holding that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws."[8] (App. p. 54).

The court of appeals viewed the Virginia State Bar, the object of this Court's *Parker* v. *Brown* analysis in *Goldfarb*, as a "state agency" or "governmental entity" (*See*, App. p. 53, App. p. 53 n. 5, App. p. 57) parallel in governmental status with the Cities. This reading of *Goldfarb* is simply contrary to the facts as stated in the decision. In *Goldfarb* the Court rejected the State Bar's *Parker* v. *Brown* defense because it found that this organization of private attorneys, although "a state agency for some limited purposes[,] . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is

[7] The Fifth Circuit's *Saenz* decision stemmed from a private antitrust action brought by a slide rule manufacturer alleging that the University Interscholastic League ("UIL"), part of a bureau of the Extension Division of the University of Texas, had conspired with another slide rule manufacturer to thwart the use of the plaintiff's product in interscholastic competition. The district court granted the defendant's motion for summary judgment, dismissing the action on the grounds that the UIL was an agency of the state exempt from the Sherman Act. Relying upon the *Parker* v. *Brown* decision, the Fifth Circuit affirmed, agreeing that the UIL, as a governmental entity, was "outside the ambit of the Sherman Act." 487 F. 2d at 1028.

[8] This case involves direct actions of political subdivisions of a state which are wholly public bodies. In seeking reversal of the court of appeals' decision, the Cities do not seek to overrule *Goldfarb* or alter its effect in cases where private business or professional groups with limited governmental functions are charged.

beyond the reach of the Sherman Act." 421 U.S. 791-92. The Court recognized that, with respect to its alleged anticompetitive conduct, the State Bar was acting not as an agent of the state, but in the private pecuniary interests of its lawyer members. Under such circumstances the State Bar's activity was not state action and its limited official role could not "create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." 421 U.S. 791.

Mr. Justice Stewart's dissent in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), recognized that *Goldfarb* involved private not public conduct: "*Goldfarb* clarified *Parker* by holding that *private* conduct, if it is to come within the state-action exemption must not merely be 'prompted' but 'compelled' by state action," 428 U.S. at 637 (emphasis added). *See also*, *Id.* at 623-24.

The crucial element of private action in *Goldfarb* was completely neglected by the Fifth Circuit in applying that decision in this case. Private acts for private gain were at issue in *Goldfarb*, while this case involves direct acts of city government in the provision of municipal services. It is, therefore, manifest that the Fifth Circuit erred when it read *Goldfarb* to "require" a holding that municipal governments are within the intended scope of the federal antitrust laws. (App. p. 54).[9] The issue in this case was *not* "laid to rest by the Supreme Court in *Goldfarb*," (App. p. 57) as the court of appeals stated

[9] The Third Circuit has also misapplied *Goldfarb* in the same fashion, holding local governmental bodies subject to the antitrust laws. *Duke & Co. Inc.* v. *Foerster*, 521 F. 2d 1277 (3rd Cir. 1975).

below. *Goldfarb* does not detract from the conclusion in *Parker* v. *Brown* that the Sherman Act was not "intended to restrain state action" (317 U.S. at 351) and it does not support the application of the federal antitrust laws to the direct activities of municipal governments.[10]

Cantor v. *Detroit Edison Co., supra,* followed *Goldfarb* as the second decision of this Court to address the "state action doctrine" since *Parker* v. *Brown.* Although the holding of *Cantor* is not directly relevant to this case, the opinions are." The defendant, The Detroit Edison Company, argued unsuccessfully that its marketing practices, which had been approved as part of tariffs filed with the Michigan Public Service Commission, were beyond antitrust scrutiny.

The several opinions delivered in *Cantor* differed as to the appropriate circumstances under which the action of private parties subject to state economic regulation might be vulnerable to antitrust attack, but each opinion acknowledges that the federal antitrust laws do not apply to direct state action and actions by state officials. The plurality opinion of Mr. Justice Stevens reads *Parker* v. *Brown* as being limited to "official action taken by state officials." 428 U.S. at 591. Although criticized by the concurring and dissenting opinions as being too restrictive a reading of *Parker,* the rest of the Court affirms that *Parker* at least held the direct acts of state government to be outside the scope of the Sherman Act. *See,* Burger C.J., concurring, 428 U.S. at 603-04; Blackmun, J., concurring, *Id.* at 613-14 n. 5; Stewart, J., dissenting, *Id.,* at 623, 637-39.

The *Cantor* opinions recognize the critical distinction between private conduct endorsed or influenced to some degree by state action and direct governmental action, a distinction ignored by the court of appeals below. *Cantor* also reaffirms *Parker's* conclusion that Congress did not intend to include the actions of state governmental bodies within the prohibitions of the antitrust laws.

Although *Parker* and the various opinions in *Cantor* refer to the state, there is no reason to believe that Congress intended to treat local governments differently in the application of the antitrust laws. Neither the language of the Sherman or Clayton Acts nor their legislative histories provide any rationale for excluding state government from the application of the antitrust laws but requiring city government to be subject to them. Nor does *Goldfarb,* which speaks of actions of the state "as sovereign," (421 U.S. at 791) provide a basis for treating cities differently than the state. Municipalities are "instrumentalities of the state for the convenient administration of government within their limits," *Louisiana* v. *City of New Orleans,* 109 U.S. 285, 287 (1883), and accordingly "their powers are such as belong to sov-

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[10] The distinction between *Goldfarb* and this case is parallel to that offered by the United States to distinguish the *Goldfarb* decision in *Bates* v. *State Bar of Arizona,* No. 76-316, argued January 18, 1977. (Brief of the United States as Amicus Curiae at 15-18).

[11] *Cantor* involved private action "approved" as part of a scheme of state regulation of private business conduct. This case involves the direct acts of public bodies which are themselves charged with violations of federal law. The opinions in *Cantor* discuss the legal and policy distinctions to be drawn between these two kinds of "state action" cases.

ereignty," *Klein* v. *New Orleans*, 99 U.S. 149, 510 (1878). Municipalities, indeed, "exercise locally . . . the sovereign power of" the state. *Breard* v. *City of Alexandria, La.*, 341 U.S. 622, 640 (1951). *Accord, Vilas* v. *Manila*, 220 U.S. 345, 356 (1911). And what a state may properly do by direct action it may do through the public agency of a municipal body. *Read* v. *City of Plattsmouth*, 107 U.S. 568, 576 (1883). Thus, there is no basis in law or policy to differentiate between the "state" and the subordinate entities of government to which the state delegates it power and authority. Cities are creatures of the state exercising the state's powers. *Parker's* holding, therefore, applies with equal force to municipalities.

New Mexico v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), the court of appeals ruling most directly in conflict with the Fifth Circuit's ruling in this case, rejected any distinction between the state and its political subdivisions. The State of New Mexico, on behalf of itself and all other public bodies in the state, brought suit against the Shell Oil Company and other suppliers of asphalt alleging violations of the federal antitrust laws. Shell in turn filed a counterclaim alleging antitrust violations by the state and various of its cities and counties. The district court dismissed the counterclaim holding the Sherman Act to be inapplicable to such governmental entities. The Ninth Circuit, in affirming, embraced the analysis of the language and history of the Sherman Act in *Parker*, noted that the Sherman Act is a criminal statute and concluded that "sections 1 and 2 of the Sherman Act do not apply to the activities of a state." 501 F.2d at 367. The *New Mexico* holding applied with equal force to the cities and counties

which were also named defendants in the counterclaim. 501 F.2d at 370 n. 5.[12]

New Mexico embodies the correct approach and answer to the question whether the federal antitrust laws apply to the actions of a state and its political subdivisions. The Ninth Circuit recognized the distinctions to be drawn between public and private acts, and carefully followed *Parker's* conclusion that Congress did not intend the Sherman Act to apply to action taken by the state. Nothing said by this Court in *Goldfarb* or *Cantor* conflicts with or detracts from *Parker* on this issue or from *New Mexico's* application of *Parker*. The Fifth Circuit's holding on the other hand, by allowing antitrust suits against political subdivisions of a state, strikes a blow at the very foundation of *Parker*.

B. The Legislative Mandate Test Should Not Be Applied To Municipalities and Would Offend Public Policy.

Under the legislative mandate test imposed by the court of appeals a municipality would have to prove that "the challenged activity was clearly within the legislative intent" (App. p. 54) in order to avoid treble damage liability or, indeed, criminal prosecution. The trier of fact in such cases would have the difficult job of determining whether "the legislature contemplated the kind of action complained of." (App. p. 55). The test is inappropriate to circum-

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[12] Authoritative commentary has also concluded that the state action doctrine of *Parker* v. *Brown* applies "where the defendants are either the states, one of its subdivisions or state officials acting under color of state authority or sovereignty." Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine*, 76 Colum. L. Rev. 1, 8-9, 16 (1976).

stances where governmental bodies are charged, and its consequences illustrate the folly of applying the federal antitrust laws to city government.

A test of this kind is appropriate when private bodies, including those with limited governmental functions, are involved. The federal antitrust laws were designed to curb abuses by private parties, and specific direction by the state should be required in order to insulate such private interests from prosecution under those statutes. The purpose of the test is to determine whether the government has compelled the activity in question. It makes no sense, however, to determine whether the state compelled action in cases where government itself is the actor. In such cases a court need only verify the precise identity and public character of the alleged antitrust violator.

This view is consistent with decisions of the courts of appeals prior to *Goldfarb*.[13] In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), the plaintiff, a former supplier of aircraft support services at Boston's Logan Airport, charged that the Massachusetts Port Authority had violated the Sherman Act by granting another company the exclusive right to supply aircraft services at the facility. The Court's first inquiry was "to consider what sort of body the Authority really is." 362 F.2d at 55. It

[13] Prior to *Goldfarb* several district courts dealt with the issue with mixed results. *See, e.g., Allegheny Uniforms* v. *Howard Uniform Co.*, 384 F. Supp. 460 (W.D. Pa. 1974); *Continental Bus System, Inc.* v. *City of Dallas*, 386 F. Supp. 359 (N.D. Tex. 1974); *Azzaro* v. *Town of Branford*, 1974-2 CCH Trade Cases ¶ 75,337 (D. Conn. 1974); *Trans World Associates, Inc.* v. *City & County of Denver*, 1974-2 CCH Trade Cases ¶ 75,293 (D. Col. 1974).

found the Authority to be "a purely public corporation for public purposes—an arm of the state—analogous to a municipal corporation" which was "acting as an instrumentality or agency of the state." 362 F.2d at 55. With this conclusion and its reading of *Parker* v. *Brown*, the First Circuit held the Sherman Act to be inapplicable to the Authority's actions.

The Eighth Circuit faced a similar question in *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970). Ladue, a private bus company, sued a bi-state agency under the federal antitrust laws claiming that it had exercised monopolistic control over the public transportation market and destroyed Ladue's competing business. The Eighth Circuit's inquiry went only so far as to clarify the origin and nature of the bi-state agency. It found "a body politic created by the legislatures of Missouri and Illinois," (433 F.2d at 137) and held that the bi-state agency's activity was not subject to the federal antitrust laws.

In *Padgett* v. *Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974), independent taxicab drivers filed an antitrust action against the Air Board for awarding a contract to the Yellow Cab Company to station cabs at the airport. Relying upon *Parker* v. *Brown* the district court dismissed the suit. The Sixth Circuit, agreeing with the district court that the Air Board (a creation of two Kentucky counties) was an agent of the state under the appropriate Kentucky statutes, held the functioning of the Air Board to be beyond antitrust scrutiny.

Likewise, in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973), the Fifth Cir-

cuit confined its analysis to a determination that the defendant was indeed a governmental entity, and finding that to be the case, ruled that the defendant was outside the ambit of the Sherman Act.

These cases indicate that analysis of any legislative mandate to engage in particular anticompetitive acts is unnecessary where the defendant is actually a public body created by the state and operated by public officials who function solely in the public interest."

The pre-*Goldfarb* case dealing most directly and most persuasively with this legislative mandate issue is *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974). In *New Mexico* the Ninth Circuit specifically recognized that in cases where private parties defend on the basis of alleged state authorization it is necessary to determine whether the anticompetitive acts are actually those of the state or

[14] The constitutional and statutory provisions cited in footnote 2, *infra*, establish the Cities' status and authority to operate their utility systems. To the degree that courts have required some inquiry to determine the governmental status of the entity charged, guidance has properly been sought from the constitutional or statutory authority granted to the entity by the state. *See, E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); *Padgett* v. *Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974). Suggestions by LP&L in the court of appeals and in its "Brief in Opposition to Petition for Writ of Certiorari" (pp. 17-18), that the decisions of state courts should control questions of an entity's governmental status and liability under federal law are erroneous. Because *Parker* v. *Brown* analysis is ultimately a matter of interpreting the scope of federal statutes, federal law must control. *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502 (4th Cir. 1959); *Cf. Jerome* v. *United States*, 318 U.S. 101 (1943).

"a private group masquerading under the banner of 'state action'." 501 F.2d at 369. The *New Mexico* court concluded that "[t]he 'legislative mandate' test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the 'legislative mandate' analysis is unnecessary." 501 F.2d at 370. This language is indeed prophetic of both the *Goldfarb* and *Cantor* decisions where close examination of the state's role, as well as that of the parties charged, was necessary to unmask private anticompetitive action.[15]

The practical problems of applying a legislative mandate test to municipalities can be readily demonstrated. The state constitutional provisions establishing municipalities, and the statutes and municipal charters which define their authority and power are not written with the kind of detail and precision which would be required to meet the Fifth Circuit's standards. Great uncertainty as to antitrust liability is unavoidable since no city will be able to determine positively that its state legislature contemplated the exact conduct that city officials have engaged in or plan. The problem is aggravated by the age of many charters and the almost total lack of published legislative histories available at the state level. The functional

[15] Careful scrutiny was necessary in *Goldfarb* to unmask the actions of private "competing" attorneys pursued under the auspices of the Virginia State Bar. Such inquiries are appropriate where the state authorizes private business to regulate itself. *See, e.g., United States* v. *Texas State Board of Public Accountancy*, Civil Action No. A-76-CA-219 (W.D. Tex., filed November 18, 1976).

result, if the Fifth Circuit's decision stands, will be to place upon the federal courts the burden of second guessing the purposes of state legislatures with little or no objective guidance from any source,[16] and to place the cities and towns of this nation under a great dilemma as to the legality of their acts and the likelihood of treble damage liability.

Few grants of operating authority to municipalities will pass muster under the legislative mandate test. The practice of state legislatures is to give general, not specific, operating authority to their subordinate political entities. This approach is essential to provide local officials with the flexibility of operation necessary to meet local needs and to react to the peculiar and varied situations which arise in their respective municipalities. Under the Fifth Circuit's decision state legislatures will be faced with the enormous task of rewriting the innumerable statutes which delegate power to political subdivisions in specific terms with restrictive consequences, or the prospect of having already beleaguered local treasuries subjected to suits for treble damages by private interests allegedly injured by official action.

2. Subjecting Municipalities To The Antitrust Laws Would Disrupt The Essential Operations of City Government.

The importance of the issue before this Court to the operation of state and local government cannot be exaggerated. Regardless of whether their defense

[16] The opinion below states that "[a] district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent" (App. pp. 55-56), an inquiry which invites prolonged discovery and trials with their concomitant effect on judicial resources.

may ultimately succeed at trial, merely exposing city governments to injunctions, treble damage liability, and perhaps criminal prosecution under the federal antitrust laws will produce enormous uncertainty and hesitancy among public officials and disserve the public interest. The potential for massive damage claims against municipal governments is not an imaginary horrible. In this case, for example, LP&L's counterclaim alleges single damages of $180 million. Even without trebling this is an enormous bill for the Cities' few thousand taxpayers to meet. Elected officials contemplating a course of public action may be unwilling to accept the economic and political risks created by the Fifth Circuit's decision.

While this case involves the operation of municipal electric utility systems, the effects will go beyond this one segment of municipal governmental operation. In response to the requirements of their citizens, cities in this country provide a broad range of services. They run hospitals and clinics, operate public transportation systems, build roads, collect garbage, and provide water and gas to their citizens. Cities operate parks and sewage treatment facilities. They offer educational and a myriad of other social services. Additionally, most cities regulate local business activity through zoning ordinances, the granting of franchises, and the licensing of those who provide certain services. Many of these activities, if conducted by private persons or corporations, might violate antitrust standards. This is true because the many functions of local government often include the exercise of "monopoly" power within local areas. Indeed, the exercise of such power is the essence of government itself.

LP&L has sought to interpose a concept of parity into the analysis of the *Parker* v. *Brown* state action doctrine. It argues that municipalities should not enjoy a "privileged status" free from the antitrust laws if LP&L (a private, investor owned corporation) must toe the mark. (*See,* Brief in Opposition to Petition for Writ of Certiorari at p. 18). This goose/gander argument ignores the statutory language and purpose of the antitrust laws as well as *Parker* v. *Brown* and the entire body of related case law, takes no account of the fundamental differences between private and public bodies, and fails to recognize the substantial policy considerations requiring separate treatment of these unique entities under the federal antitrust laws.[17]

The power of state and local governments is not private power derived from amassed capital or shrewd business practice; it is power derived from

[17] LP&L would make applicability of the federal antitrust laws turn on whether the governmental body was engaged in a proprietary or "profit-making business" activity. (Brief in Opposition to Petition for Writ of Certiorari, p. 18). The *New Mexico* court rejected the argument that a state should be subject to the antitrust laws when it engaged in "business activities". The court held that "[t]he basis (grounded in federalism) for our conclusion that Congress did not intend the Sherman Act to apply to the states does not vary in strength depending on the specific activity in which the state engages." 501 F. 2d at 371-372. Even the court below refused to "import the discredited proprietary-governmental distinction into this area of law." (App. p. 56 n. 8). The circuit courts in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra,* and *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District, supra,* likewise rejected this basis for imposing antitrust liabilty upon state governmental bodies. Mr. Justice Frankfurter in *Indian Towing Company* v. *United States,* 350 U.S. 61, 65 (1955), also warned against entering the quagmire of governmental/non-governmental distinctions in applying federal law.

the polity. Applying the federal antitrust laws to the direct acts of public governmental bodies would inhibit the ability of the states and their political subdivisions to exercise their responsibilities and strike a blow at local government and this nation's federalist structure.[18] Indeed, this Court has recently recognized the importance of not interferring with matters of local governmental choice and economic regulation. *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976).

Unlike private persons, political bodies are, by definition, charged with acting in the public interest. They exist to carry out the popular will and are managed by officials subject to removal from office should the discharge of their duties not conform to the will and expectations of the electorate. The antitrust laws are neither necessary nor appropriate to prevent transgressions by local public authorities. Under our federal system the remedy for abuses of public power by state and local officials traditionally has been left to local law, state and local political action and actions for redress of violations of constitutional rights and limitations. (*See, e.g.,* Blackmun, J., concurring in *Cantor,* 428 U.S. at 612.) The federal antitrust laws, with their provisions for criminal sanctions and treble damage liability, were not designed to curb action by public institutions and should not be applied to interfere with or control the actions of locally elected officials in the discharge of their official functions. Affirmance of the Fifth Circuit would remove decisions of local governments from elected officials

[18] The integrality of the *Parker* v. *Brown* doctrine to constitutional federalism is persuasively argued by Professor Handler in his article, *The Current Attack on the Parker* v. *Brown Doctrine,* 76 Colum. L. Rev. 1 (1976).

and place them in the hands of federal judges in the context of adversary proceedings. Such a drastic restructuring of governmental responsibilities should be steadfastly avoided in the absence of a clear congressional intent to the contrary.

It bears repetition that the federal antitrust laws were enacted to protect the public from abuses of private economic power. *Parker* v. *Brown, supra,* at 351-52; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 491-93 (1940). The Court in *Standard Oil Company of New Jersey* v. *United States,* 221 U.S. 1 (1911), reminds us that the Sherman Act was passed as a result of "the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization . . . , and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." 221 U.S. at 50. There is no evidence that Congress intended locally elected officials or the governmental bodies they serve to be subject to prosecution under the federal antitrust laws.

These principles have been accepted law for decades. In that time the Congress has had ample opportunity to alter this construction of the scope of the antitrust laws. The Cities contend that the Fifth Circuit erred when it read *Goldfarb* to require a departure from this accepted interpretation, and submit that this Court should rectify this significant and perilous diversion.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be Reversed.

Respectfully submitted,

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Dated: May 12, 1977

ADDENDUM

ADDENDUM

Sherman Act

SEC. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SEC. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act

SEC. 3

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Louisiana Constitution of 1974 (Effective January 1, 1975)

ARTICLE VI. LOCAL GOVERNMENT

PART 1. GENERAL PROVISIONS

Section 7. Powers of Other Local Governmental Subdivisions.

Section 7. (A) Powers and Functions. Subject to and not inconsistent with this constitution, the governing authority of a local governmental subdivision which has no home rule charter or plan of government may exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by its charter or by general law, if a majority of the electors voting in an election held for that purpose vote in favor of the proposition that the governing authority may exercise such general powers. Otherwise, the local governmental subdivision shall have the powers authorized by this constitution or by law.

Louisiana Constitution of 1921 (as amended)

ARTICLE XIV. PAROCHIAL-MUNICIPAL AFFAIRS

SECTION 40. MUNICIPALITIES; CHARTERS AND POWERS; HOME RULE

(d) The provisions of this constitution and of any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith. Subject to the foregoing restrictions every municipality shall have, in addition to the powers expressly conferred upon it, the additional right and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions.

Louisiana Statutes Annotated (LSA)

R.S. 33:621

The inhabitants of the city shall continue a body politic and corporate by its present name and, as such, shall have perpetual succession; may use a corporate seal which it may alter at will; may sue and be sued; may acquire prop-

erty in perfect ownership or lesser interest by purchase, donation, appropriation, lease, or lease with the privilege to purchase for any municipal purpose, and may also acquire all excess over that needed for all such purposes, and sell or lease such excess with proper restrictions in order to protect and preserve the improvement; may sell, lease, hold, manage and control such property, and make any and all rules and regulations, by ordinance or resolution, which may be required to carry out fully the provisions of any conveyance, or will, in relation to any gift or bequest or the provision of any lease by which it may acquire property; may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities; may assess, levy, and collect taxes for general and special purposes; may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt, on the security of the municipality, or of any improvement or excess property thereof; may appropriate money out of the city treasury for all lawful purposes; may create, provide for, construct, and maintain all things of the nature of public works and improvements; may grant franchises and licenses and fix the terms and regulate the exercise thereof, and no waiver or forfeiture of the power to regulate publicly operated public utilities, may be effected; may levy and collect assessments for local improvements; may define, regulate, prohibit, abate, suppress, or prevent all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the inhabitants of the city, and all nuisances and causes thereof; may regulate and control the use, for whatever purpose, of the streets or other public places; may create, establish, abolish, and organize offices, and fix the salaries and compensations of

all officers and employees except as provided in any applicable civil service laws; may make and enforce local police, sanitary and other regulations; and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city and for the performance of the functions thereof. The city shall have all the powers that are granted to the existing municipality by general or special laws; and all such powers, whether express or implied, shall be exercised and enforced in the manner prescribed by this Part, or when not prescribed herein, in such manner as shall be provided by ordinance or resolutions of the commission.

R.S. 33:1326

Any parish or municipality operating a gas, water, or electric light or power system, sewerage plant, or transportation system, may extend such services to persons and business organizations located outside its territorial bounds, or to any other parish or municipality. Such extension shall be in accordance with the terms of service agreements entered into by the parish or municipality supplying the service and the persons, business organizations, parishes, or municipalities receiving the service.

R.S. 33:4162

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14 of Article 14 of the Constitution of Louisiana of 1921, may construct, acquire, extend, or improve any revenue producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public.

A municipal corporation may lease waterworks systems, electric light and power plants, combined water and electric systems, garbage plants, sewerage works, electric street

and interurban railways, gas plants and distributing systems.

No municipal corporation may lease or purchase gas fields, wells, lands, or holdings for the purpose of drilling and operating gas wells.

A parish may lease gas plants, gas distributing systems, gas wells, gas lands and holdings.

R.S. 33:4163

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA and CITY OF PLAQUEMINE, LOUISIANA,
Petitioners,

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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LOUISIANA POWER & LIGHT COMPANY,
Respondent.

BRIEF FOR RESPONDENT

QUESTION PRESENTED

The question presented is whether the actions of a city are automatically outside the scope of the federal antitrust laws.[1]

STATEMENT OF THE CASE

The question comes before the Court as the result of the dismissal by the district court under Rule 12[2] of the amended

[1] "The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws." (*City of Lafayette, et al. v. LP&L*, App. p. 51.) "App." refers to Joint Appendix.

[2] See App. pp. 42-43 for Cities' motion to dismiss.

counterclaim of Louisiana Power & Light Company (LP&L), respondent in this matter, against the Cities of Lafayette and Plaquemine (Cities), petitioners herein.[3] LP&L charged that the Cities violated the antitrust laws of the United States through entering into contracts in restraint of trade and conducting sham and frivolous litigation. The actions which precipitated the appeal began when LP&L moved for leave to amend and supplement its answer and counterclaim to charge one of the petitioners with violating the antitrust laws by illegally requiring people living outside its city limits to take electricity from the city in order to obtain gas and water. (App. pp. 33-34.) The Cities opposed LP&L's motion on the ground that LP&L's amendment failed to state a claim upon which relief may be granted. After the District Court denied LP&L's motion for leave to amend (App. pp. 29-30), LP&L filed a motion for reconsideration in which it conceded that if its amendment failed to state a claim, so did its unamended counterclaim. (App. pp. 30-32.) The Cities then filed a motion to also dismiss LP&L's counterclaim. (App. pp. 42-43.)

On February 28, 1975 the district court issued an order for the purpose of clarifying the record, granting LP&L's motion for leave to amend its counterclaim to charge an illegal tie-in. (App. pp. 44-48.) Then, in the same order the district court ruled that the entire counterclaim should be dismissed. Upon dismissal LP&L appealed. (App. p. 49.) Relying upon this Court's holding that the antitrust laws could indeed apply even to what this Court had described as "a state agency by law"

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[3] In dismissing the counterclaim, the district court noted: "The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States." (App. pp. 47-48.) See also Petitioners' Brief p. 4.

[*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 789-790 (1975)] the United States Court of Appeals for the Fifth Circuit reversed. (App. pp. 51 *et seq.*)

SUMMARY OF ARGUMENT

This Court held in *Parker v. Brown*, 317 U.S. 341 (1943), that the Sherman Act did not apply to the state acting as sovereign in imposing a restraint as an act of government. 317 U.S. at 352. In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975), this Court established one criterion for the applicability of *Parker v. Brown* immunity, *i.e.*, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 U.S. at 790. This Court found that under this test even a state agency by law could be subject to the standards of the antitrust laws. See *Goldfarb*, 421 U.S. at 789-790. For *Parker v. Brown* immunity to exist, "anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791.

Applying this *Goldfarb* criterion, the United States Court of Appeals for the Fifth Circuit reversed the dismissal of LP&L's counterclaim, as amended, and remanded the matter for a determination of whether the anticompetitive activities of the Cities "fall within the intended scope of the powers granted to the Cities by the legislature." (App. p. 58.) LP&L contends that the anticompetitive conduct by the Cities is beyond the scope of authorization by the legislature.

Subsequent to *Goldfarb* this Court held in *Cantor v. Detroit Edison*, 428 U.S. 579 (1976) that direct *Parker v. Brown* immunity applied only "to official action taken by state officials." 428 U.S. at 591. Petitioners, Louisiana municipalities, also fail

to meet this additional *Cantor* criterion. In Louisiana "a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation." *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 892; 112 So.2d 635, 650 (La. S.Ct. 1959). The action in question is not action of a municipal corporation *qua* state agency, but one as agent of its corporators engaged in private acts for private gain. *New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478, 481 (La. S.Ct. 1874).

Petitioners' policy argument is unsound. Applicability of the antitrust laws in these circumstances is warranted by considerations of consumer welfare, stability of decisions, and common fairness. Given the policies and principles of the antitrust laws as previously determined by this Court, the Cities' claim of immunity should be denied.

ARGUMENT

I. Municipal Corporations Are Not Exempt From the Antitrust Laws in Operating Utility Systems

Since this matter is before this Court on barebones pleadings, there is little that can be said in the way of analysis of facts. LP&L has thus far had no opportunity to develop in the record the facts of its case against the Cities, save what it has developed incidentally to the Cities' case against LP&L, which are not of record here. Only the few matters that came to the direct attention of officers of the company are included in the affidavit of Mr. Wyatt (App. pp. 35-41).

Thus, this is basically a matter of pure law: Are the actions of a city "engaging in what is clearly a business activity; activity in which a profit is realized" (App. p. 47) automatically outside the scope of the federal antitrust laws? Is there an immunity even where a city has, as LP&L alleges, "unlawfully restrained trade . . . by contracting to provide customers outside city limits certain products (*e.g.*, gas and water) only on the condition that said customers also purchase a different tied product, *i.e.*, electricity, or at least agree that they will not purchase that tied product from any other supplier"? (App. p. 33.) How does the alleged status of a "state agency" protect those consumers who are excluded from the municipal franchise and have no effective political control over what the city does? LP&L submits that the answer given by the United States Court of Appeals for the Fifth Circuit is supported by an analysis of the principles enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

A. **The Parker v. Brown Decision.**

The Cities claim absolute immunity[4] from the antitrust laws on the basis of the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). They argue that this decision holds that the Sherman Act was not intended to apply to any actions of a state and means that they cannot be liable because they are "wholly governmental state bodies", each "merely a subdivision of the state."[5] (Petitioners' Brief, p. 5.) An analysis of this decision fails to support their argument.

In *Parker v. Brown* the plaintiff, a producer and packer of raisins in California, brought suit to enjoin the State Director of Agriculture and others from enforcing a state agricultural proration program. A three-judge district court held that the raisin marketing program directly interfered with and burdened interstate commerce and was therefore invalid under the commerce clause of the Constitution and therefore issued the injunction. 39 F.Supp. 895 (S.D. Cal. 1941).

This Court heard argument on the case at the October Term, 1941. On May 11, 1942 the Court ordered it restored to the

[4] The Cities purport to distinguish their argument as one of the *inapplicability* of the antitrust laws rather than *immunity*. This distinction is not supported by the decisions of this Court. In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975) the Court treated the question of the application of the antitrust laws to the State Bar, "a state agency by law," (*id.*, 789-790), as one of immunity, noting that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." (*Id.*, 787.)

[5] As noted by the appellate court below, the Cities "would have us equate cities and states for purposes of determining 'state action'. No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs." (App. p. 54, n. 6.) As shown *infra* in this brief those bald statements by the Cities are in error. Moreover, as this Court was careful to note in *Cantor v. Detroit Edison*, 428 U.S. 579 (1976), the broad use of the term "state action" as in *Monroe v. Pape*, 365 U.S. 167 (1961), is not that intended by *Parker v. Brown*, 317 U.S. 341 (1943). See *Cantor*, 428 U.S. at 590.

docket for reargument for October 12, 1942, requested the Solicitor General to participate as *amicus curiae* and requested the parties to address the question *inter alia* of "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act. . . ." *Supplemental Brief for Appellants* pp. 1-2 (quoting statement by Court).

In carefully selected language plainly limiting its holding, this Court ruled there was no antitrust violation where the state "as sovereign imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Parker v. Brown*, 317 U.S. 341, 352 (1943). In contrast, the Cities read *Parker* simply as holding "that the Sherman Act does not apply to state government." (Petitioners' Brief, p. 5.) This ignores the qualifications "as sovereign" and "as an act of government" contained in the Court's *Parker* opinion.[6] As will be shown, *infra*, the activities of the Cities here at issue do not meet the *Parker* criterion of immunity for an action "as sovereign" required as "an act of government."

B. **The Goldfarb Decision.**

Subsequent to the district court's dismissal of LP&L's counterclaim, this Court decided *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Plaintiffs had brought suit against the Virginia State Bar and Fairfax County Bar Associations alleging that the County Bar's adoption of a minimum fee schedule, declared by the State Bar to be an enforceable standard, constituted price-fixing and restraint of trade and commerce in violation of

[6] It also goes far beyond even what the State of California argued. In the *Supplemental Brief for Appellants* filed by the Honorable Earl Warren, later Chief Justice of this Court, the State relied on the principle that the doctrine of monopoly *"cannot be applied to a state in exercising governmental functions."* *Supplemental Brief for Appellants*, pp. 39-40.

Section 1 of the Sherman Act. The district court found that minimum fee schedules constituted price-fixing, but also held that the State Bar was immune under *Parker v. Brown* since it acted as an administrative agency of the Supreme Court of Virginia, as stipulated for the record by the parties. *Goldfarb v. Virginia State Bar*, 355 F.Supp. 491, 495-496 (E.D. Va. 1973). It distinguished the County Bar on the basis that it was a voluntary association of private persons and held the County Bar could be liable. The Court of Appeals for the Fourth Circuit agreed with the district court that the State Bar was immune under *Parker v. Brown* (and that the *Parker v. Brown* immunity did not apply to the County Bar), but held against plaintiffs on other grounds. *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974). The plaintiffs then took the matter to this Court on petition for writ of certiorari.

This Court reversed the decision that the State Bar was not subject to the antitrust laws. It described the State Bar as "a state agency by law." 421 U.S. at 789-790. It looked to state law to determine whether the State required the State Bar to set fees and found that it did not. 421 U.S. at 790. Most importantly, it held: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Ibid.* Thus, under *Goldfarb v. Virginia State Bar* not all state action is immune from antitrust scrutiny, but only a "type" of state activity—where the state acted *as sovereign*. The Court reiterated this requirement by stating that in order for immunity to exist "anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791.

The Court also observed that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices

for the benefit of its members." *Ibid.* The Cities, municipal corporations of the State of Louisiana, argue that their status is different from that of the Virginia State Bar in that they are not just state agencies "for limited purposes," *ibid*, but political subdivisions of a state.

The Cities beg the question, since municipal corporations do have a dual nature, in part private and in part public.[7] As will be shown *infra*, the Cities are not acting as state agencies in the discharge of their functions here at issue.

C. The Fifth Circuit's Response to Goldfarb

Given that "[t]he threshold inquiry . . . is whether the activity is required by the State acting as sovereign," *Goldfarb*, 421 U.S. at 790, and given this Court's application of this test to what it described (and the record conclusively established) was "a state agency by law" *ibid*, what should the response of the United States Court of Appeals for the Fifth Circuit have been? The Cities would have that court ignore or distort *Goldfarb*.

The Cities candidly stated their views in their petition for rehearing *en banc* (App. p. 59, *et seq.*). They claimed that the Fifth Circuit committed error in its interpretation of *Goldfarb* in viewing the Virginia State Bar as "a state agency by law" (App. p. 62), though these were the exact words used by this Court. *Goldfarb*, 421 U.S. at 789-790. Even now, in their brief to this Court, the Cities still maintain that "[t]his reading of *Goldfarb* is simply contrary to the facts as stated in the decision." (Petitioners' Brief p. 10.) LP&L submits that the error

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[7] See note 5, *supra*. As will be shown in this brief, *infra*, Louisiana follows the majority rule in recognizing the dual nature of municipal corporations. See also, generally, the cases cited in C.J.S. *Municipal Corporations* §3b.

lies not with the Fifth Circuit, but with the Cities. In reality, the Cities' contention is, in essence, that *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), is wrong, though they will not put it that way.

Petitioners' mistaken notion of how the Fifth Circuit should have responded to this Court's *Goldfarb* decision is further shown by their continued reliance on *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). (See Petitioners' Brief, pp. 9, 10, and 17.) The Cities would have had the Fifth Circuit apply the Cities' interpretation of *Saenz* (a decision by the appellate court on its summary calendar[8]), rather than this Court's decision in *Goldfarb*. The appellate court declined this unusual invitation, saying:

> "Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis v. Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*." (App. p. 57.)

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[8] The Fifth Circuit did not construe *Saenz* the way the Cities urge. (App. pp. 56-57.) In addition, as this Court noted in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) summary dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." Distinctions may be drawn between this Court's summary dispositions and the practice of the Fifth Circuit with respect to its "summary calendar." Nevertheless, it would be odd indeed to accord more weight to this "precedent" than did the Fifth Circuit.

D. The Cantor Decision

The Cities apparently believe that their case is somehow supported by *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). On application to the Fifth Circuit for rehearing *en banc*, the Cities stated "[w]e think the *Cantor* decision calls for reversal of the panel in this case." (App. p. 74.) Yet, in their brief to this Court, the Cities merely argue that "[a]lthough the holding of *Cantor* is not directly relevant to this case, the opinions are." (Petitioners' Brief, p. 12.)

The activity in question in *Cantor* was the distribution by The Detroit Edison Company of electric light bulbs to its customers without charge separate from that made by the company for electricity. The program had been approved by the Michigan Public Service Commission pursuant to a tariff filed by Detroit Edison. The issue in *Cantor* was whether Detroit Edison could claim an absolute immunity for its distribution program under *Parker v. Brown*, 317 U.S. 341 (1943). As the matter had arisen from the granting of summary judgment against the plaintiff, all doubt as to facts were resolved in favor of him. 428 U.S. at 582. The Court inferred that the policy of the State was neutral on the question of whether a utility should or should not have such a program. 428 U.S. at 585.

In *Cantor*, unlike the situation in *Goldfarb*, there was no claim by plaintiff against any public official or any representative of the State. The district court and the court of appeals held that under *Parker* the Commission's approval exempted the practice from the antitrust laws. *Id.*, 581.

In reversing the lower courts' decisions, this Court reiterated that *Parker* "held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act." *Cantor v. Detroit Edison Co.*, 428

U.S. 579, 589 (1976). This Court held that in *Parker* Mr. Chief Justice Stone "carefully selected language which plainly limited the Court's holding to official action taken by state officials." *Id.*, 591.

The Cities read this language as somehow supporting their contention that *Parker* establishes a rigid bright-line rule with respect to state action immunity. Such a construction would do the one thing that no member of the Court in *Cantor* wished done: It would nullify *Goldfarb*. All of the Justices of the Court in their opinions took their respective stands by *Goldfarb*. Mr. Justice Stevens, writing for the Court, pointed to the careful use of language in that opinion as weighing against a broad claim of immunity, 428 U.S. at 600. The Chief Justice, concurring in part and dissenting in part, pointed up the emphasis by the Court in *Goldfarb* on the challenged activity rather than the identity of the parties. *Id.*, 604. Mr. Justice Blackmun, concurring, noted *Goldfarb* established a *prerequisite* to immunity, that conduct is required by state law, not what is sufficient to have immunity. *Id.*, 609. Finally, Mr. Justice Stewart, dissenting, relied throughout his opinion on the continuing vitality of *Goldfarb*. *Id.*, 614 *et seq.*

LP&L does not suggest that the *Cantor* decision is without its difficulties. Certainly, for example, the interrelationship between it and *Goldfarb* with respect to anticompetitive conduct of private parties will need to be spelled out in future decisions. But nothing in *Cantor* can be construed as overruling the limitations on state action immunity already recognized by *Parker* and *Goldfarb*. For there to be state action immunity there still must be action by the State (1) *as sovereign* and (2) imposing the anticompetitive conduct in question. The Cities cannot meet those tests in this case.

At most, *Cantor* established a criterion in addition to that of *Goldfarb*, rather than as a substitute for *Goldfarb*. This

additional *Cantor* criterion limits direct state action immunity to "official action taken by state officials." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976). For direct state action immunity to exist, both the *Goldfarb* "threshold" criterion and the *Cantor* criterion must be met. For an indirect state action defense to exist, a private defendant must show that his activity was so directed and compelled by the action of the state as sovereign that it would be unfair to deem him the legal cause of such activity.

In any event, *Cantor* cannot be construed as establishing any *ipso facto* immunity on the part of state agencies. Such a construction would, in effect, adopt the very opinion of the Court of Appeals that this Court rejected in *Goldfarb*. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974).

E. Application of the Law to This Case.

As this matter arises from the dismissal of LP&L's counterclaim under Rule 12, the Court should assume for purposes of its decision that all of the conduct whereof LP&L complains would violate the antitrust laws but for the defense of state action immunity.[9] For purposes of illustration, LP&L will use what is perhaps the clearest example of an antitrust violation—the tie-in.

The Cities, unlike LP&L, may lawfully engage in the business of distributing natural gas, as well as electricity.[10] A municipally-owned utility system would enjoy the same element of natural monopoly in the areas where it distributes as would any other

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[9] See *Cantor v. Detroit Edison*, 428 U.S. 579, 582 (1976).

[10] LP&L is powerless to counter a tie-in of gas and electricity with its own offer of gas since it cannot lawfully engage in the distribution of gas under the Public Utility Holding Company Act of 1935, 49 Stat. 838 (1935), 15 U.S.C. §79 *et seq.* See *SEC v. Louisiana Public Service Commission*, 353 U.S. 368 (1957).

gas distribution system. Thus, the City of Plaquemine must be deemed to possess monopoly power in its distribution of gas and water in that area immediately to the south of that City and outside the City limits. The inhabitants of that area, being outside the City limits, cannot vote in municipal elections and therefore have no effective political control over the City in the operation of its utility systems. They are fully subject to its monopoly power to the same extent and with the same potential effect as if they were there served by an investor-owned utility.

Under applicable Louisiana law, it is clear that petitioners in the operation of their municipal utility systems are not acting as sovereign with respect to the dispute at issue. The controlling decision in Louisiana is *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 112 So.2d 635 (La. S.Ct. 1959). In that case, a Louisiana municipal corporation (Monroe) was in competition with LP&L for customers outside its city limits. Monroe owned and operated an electric system and a water distribution system. It did not absolutely refuse to sell its non-electric commodity to LP&L's customers, as did Plaquemine, but it did refuse to sell to LP&L's customers unless they paid a great deal more for water than Monroe charged people who also took electricity from Monroe.

When sued because of this conduct, Monroe, like petitioners here, claimed a special immunity on the ground that it was a state agency. The Louisiana Supreme Court expressly considered and rejected authority from certain other jurisdictions which would have immunized the city by treating it as having some special public character and held:

> "These concepts do not prevail in Louisiana. In this state a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation. See *Vicksburg, S. & P. Railway Co. v. City of Monroe*, 1927, 164 La. 1033, 115 So. 136, supra." *Hicks, supra*, 237 La. at 892, 112 So.2d at 650.

In the *Vicksburg* case, applied in *Hicks*, the Louisiana Supreme Court held:

> "It is clear, therefore, that the operation by the city of Monroe of a street railway is a private undertaking for private gain, and that the position of defendant municipality in the case at bar is the same as that of a private corporation engaged in the same business.
>
> While, in the matters affecting the public welfare, the city of Monroe may pass all reasonable ordinances as to the regulation of railroads within its jurisdiction, under the statutes relied upon in this case, yet, quoad its private enterprise, or street railway, defendant municipality does not enjoy the status of a governmental agency, but is governed by the rules applicable to a private corporation." 164 La. at 1039, 115 So. at 138.

In Louisiana the principle underlying those cases may be traced to the decision of the Louisiana Supreme Court on rehearing in *New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478 (La. S.Ct. 1874), where the court held that a municipal corporation had a dual nature, in part public, in part private:

> "In all that relates to one class it is merely the agent of the State and subject to its control; in the other *it is the agent of the inhabitants of the place*—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator." *Id.*, 481, emphasis added.

When Plaquemine refuses to serve gas or water to somebody living outside its city limits who is being served electricity by

LP&L, unless the customer requires LP&L to disconnect him so he can take electricity from Plaquemine, then Plaquemine is not acting as a governmental agency or one to whom the state has delegated the exercise of some sovereign rights. Rather it is acting purely and simply to profit those who own it—the inhabitants inside the City. If Plaquemine gets together with other municipal utility systems and encourages them to adopt the same practice further to diminish the business of LP&L, to improve its bargaining position, or for whatever purpose, Plaquemine is not acting as a sovereign but as a conspirator in restraint of trade.

In the circumstances, the Cities cannot meet the criteria for immunity from antitrust liability established by this Court in *Parker v. Brown*, 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). The Cities fall short of the *Goldfarb* criterion because they have not shown that the activity in question "is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975). The Cities also fail to meet the *Cantor* criterion for they have not shown that the anticompetitive activity in question is in fact "official action taken by state officials." 428 U.S. 579, 591 (1976).

In their Brief the Cities claim that a decision contrary to their interests would strike a blow at "this nation's federalist structure." (Petitioners' Brief, p. 23.) As this implies that somehow the policy of the State of Louisiana is in accord with the Cities' anticompetitive activities, the record should be set straight.

The Cities ignore that the antitrust laws themselves are part of the "restrictions imposed by general law for the protection of other communities" which municipalities are bound by the provisions of La. R.S. 33:621 to observe in the operation of any public utility systems. Louisiana itself has an antitrust stat-

ute, La. R.S. 51:121 *et seq.*, which together with Federal antitrust law, is part of this general law.

Immediately after *Goldfarb* the Legislature of Louisiana provided for the creation of a new type of municipal-county (parish) electric entity. In the neighboring state of Florida, where a United States district court had refused to grant a motion to dismiss a counterclaim against a municipal utility system charging a tie-in illegal under the antitrust laws,[11] a state court decision on state law had raised questions about the applicability of the law to a municipal-county entity.[12] The Louisiana Legislature went to such lengths to make sure that the creation of such an entity could not be used to immunize its participants from the antitrust laws that it expressly provided in Act 597 of 1975, R.S. 33:1334(G) that nothing therein ". . . shall be construed to grant an immunity to or on behalf of any public instrumentality created under this Act from any antitrust laws of the state or of the United States." Thus, there is simply no showing of state policy in favor of the restraints in question.

II. Application of the Antitrust Laws to Municipally-Owned Utility Systems Does Not Offend Public Policy

After having devoted a few pages of their argument (Petitioners' Brief pp. 7-15) to their reading of *Parker*, *Goldfarb* and *Cantor*, the Cities devote the bulk of their argument (Petitioners' Brief, pp. 15-24) to an attempt to establish that application of the antitrust laws to municipalities somehow is against public policy. An analysis of the principles and policies underlying the antitrust laws and the decisions of this Court shows their argument to be in error.

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[11] *Gainesville Utilities, et al. v. Florida Power Corporation, et al.*, Docket No. 68-305-Civ-J, Order of September 25, 1970 (M.D.Fla. 1970).

[12] *University Avenue Church of the Nazerene v. City of Gainesville*, Case No. C-1329-72 (Alachua County, Florida, 1973).

A. Protection Against Injury to Competition.

For purposes of their argument the Cities are fortunate in being able to divine a single purpose for the antitrust laws of the United States, *i.e.*, to protect against vast accumulations of private wealth. (Petitioners' Brief, p. 24.) Though this certainly may be one of the purposes of the antitrust laws, it is not the only one. Petitioners' citation to the portion of *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911), discussing the Congressional debates is not the whole story. Certainly Senator Sherman was not so narrow as the petitioners would have it. Speaking in support of his bill, he stated that his bill sought "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer."[13]

If consumer welfare is indeed at least one of the policies underlying the Sherman Act, petitioners' argument for a narrow construction of the Sherman Act must be rejected. It is impossible to see how a customer who is forced by a tie-in to take electricity from a municipality at a price higher than that offered by an investor-owned utility and who lives outside the city limits is less injured by the municipal utility than he would be by the same conduct undertaken by an investor-owned dual service utility, of which there are a number.

Moreover, this Court in *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911), the case cited by petitioners, looked to the law of this country as it existed at the time of enactment to construe the words of the Sherman Act rather than to the subjective motives of the lawmakers, which it described in the portion quoted by petitioners. Looking to this Court's understanding of the law of the time as a guide to the meaning of the Sherman Act we do find this very succinct statement immediately preceding the Court's statutory exegesis:

[13] 21 Congressional Record 2457 (1890).

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 221 U.S. at 58.

If we then turn, as the Court in *Standard Oil* did, to the very text of Section 1 of the Sherman Act, it is difficult to find in it the limitations which petitioners would find:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal. . . ."[14]

Moreover, whatever the original intent of the Sherman Act, it is clear that the text of Section 4 of the Clayton Act,[15] providing treble damages to one injured "in his business or property", constitutes a Congressional recognition that one of the

[14] 26 Stat. 209 (1890), as amended, 15 U.S.C. §1.

[15] 38 Stat. 731 (1914), as amended, 15 U.S.C. §15.

purposes of the antitrust laws, including the Sherman Act and Section 3 of the Clayton Act,[16] is to protect against the effect of injury to competition on competitors. Nothing in Section 4 of the Clayton Act discriminates between types of persons protected against injury in business or property.

In *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), this Court established the policy that the antitrust laws would govern the competitive relationship between municipally-owned utility systems and investor-owned utility systems in the absence of any pervasive regulatory scheme inconsistent with such laws. Under *Otter Tail*, to the extent practicable, competition is supposed to serve as a force regulating the business relations of municipalities and investor-owned utilities.

A holding that a municipally-owned utility is absolutely immune in all circumstances under *Parker v. Brown* would deprive the courts of the opportunity of considering both sides of the competitive relationship between the respective entities and, therefore, of an opportunity to get at the facts necessary to make the Sherman Act apply to the utility industry in a rational manner. A holding of the inapplicability of the antitrust laws to such entities is thus clearly at odds with the principles underlying *Otter Tail*.

The District Court stated in its written reasons for dismissing LP&L's counterclaim that it was reluctant to hold that entities such as the Cities must always be immune from the antitrust laws where the cities "are engaging in what is clearly a business activity; activity in which a profit is realized." (App. p. 47.) Underlying this reluctance appears to be a sense of fundamental fairness, of what the Cities derisively term the "goose/gander argument." (Petitioners' Brief, p. 22.) By its decision in *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975), this Court removed the barrier to full implementation of the

[16] 38 Stat. 731 (1914), as amended, 15 U.S.C. §14.

principles of *Otter Tail* presented by the imperfect appellate articulation of the state action doctrine. LP&L urges the Court not to re-erect the fallen obstacle.

Most of petitioners' policy arguments are merely makeweight. For example, the arguments of second-guessing state legislatures (Petitioners' Brief p. 20), the alleged vagueness of the standard for treble damage or criminal liability (Petitioners' Brief p. 21), and the potential disruption of services essential to the community (*ibid*), all have applicability to the effect of potential liability on the services and capital needs of investor-owned utility companies. Under *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), these policy considerations are given less weight than the principle of competition.

Petitioners ignore the actual policy implications of their argument on the intricacies of the structure of the electric utility industry in which there are varying shades of public participation, ownership and regulation of utilities. How, for example, would plaintiffs' proposed rule of immunity affect a joint venture of a public power authority, such as the Power Authority of the State of New York, and an investor-owned utility such as, for example, Consolidated Edison Company?[17]

At present, under Section 105 of the Atomic Energy Act of 1954, 68 Stat. 938 (1954), as amended, 42 U.S.C. § 2135, both public and private entities are subject to antitrust scrutiny.[18]

[17] The company plans to operate a nuclear unit owned by New York. See *Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3)*, NRC Docket 50-286, 40 Federal Register 31044 (July 24, 1975).

[18] Public entities are required to submit the same information as investor-owned entities for antitrust review under Nuclear Regulatory Commission Regulations, 10 C.F.R. Pt. 50, Appendix L (1977). For an example of antitrust scrutiny of a public entity in this context, see *Omaha Public Power District*, NRC Docket No. P-556-A, 40 Federal Register 28877-8 (July 9, 1975), reproduced in the Addendum at the end of this brief as a convenience to the Court. For an instance where conditions were recommended to be imposed for anti-

Under petitioners' argument there could be no such scrutiny of public entities.

B. **The Effect Upon Stability of Decisions**

The "policy" argument by petitioners that their view "is consistent with decisions of the courts of appeals prior to *Goldfarb*" (Petitioners' Brief, p. 16), points up the need to consider the effect of the adoption of their view upon the post-*Goldfarb* actions of the lower federal courts. A survey of actions by and in these courts shows that the policy of stability of decisions weighs in favor of sustaining the Fifth Circuit's decision.

In *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) the Court of Appeals reversed the dismissal of three municipal corporations from a private antitrust action and held:

> "We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive government activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Id.*, 1280.

Prior to *Goldfarb*, the district court in *United States v. Oregon State Bar*, 385 F.Supp. 507 (D. Ore. 1974) refused to dismiss a civil action brought against the Oregon Bar, a state agency by law. *Id.*, 508. After *Goldfarb*, the court granted defendant's motion to dismiss for mootness on grounds that "[t]he recent decision of the Supreme Court in *Goldfarb*, *supra*, coupled with

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trust reasons on a unit partly owned by a municipality, albeit owing to the alleged conduct of the investor-owned partners, see *Los Angeles Dept. of Water and Power, et al.*, NRC Docket No. P-499-A, 40 Federal Register 57518-9 (December 10, 1975). The activities of the public entities were nonetheless scrutinized as the Department concluded: "In our review of the activities of LADWP, State of California, Anaheim, Glendale, Riverside, NCPA and Pasadena no evidence of anticompetitive conduct has come to our attention." Id., 57519.

the Oregon Bar's withdrawal of the suggested fee schedule and its announced intent to refrain from any further activity in this area indicates that the practice complained of cannot reasonably be expected to recur." *United States v. Oregon State Bar*, 405 F.Supp. 1102, 1104 (1975). The stability which made this decision possible would be undermined by adoption of the Cities' position.

On August 11, 1975 the Fifth Circuit granted a motion by the United States for summary reversal of a district court's quashing of a civil investigative demand whereby the Department of Justice sought to examine the affairs of a state agency, the Texas State Board of Public Accountancy. *Texas State Board of Public Accountancy v. United States*, Docket No. 75-2621, Order of August 11, 1975 (5th Cir. 1975). The dismissal by the district court had been predicated in large part upon state action immunity. *Texas State Board of Public Accountancy v. United States*, Docket No. A-74-CA-270, Memorandum Opinion and Order of April 16, 1975 (W.D. Tex. 1975). This Court denied certiorari. *Texas State Board of Public Accountancy v. United States*, 423 U.S. 1033 (1975). Subsequent to *Goldfarb*, the United States brought a civil antitrust action against the same state agency and this time the United States District Court for the Western District of Texas held against the state agency on its motion to dismiss. *United States v. Texas State Board of Public Accountancy*, Docket No. A-76-CA-219, Order of February 18, 1977, (W.D.Tex. 1977). A reversal of the Fifth Circuit's decision now would certainly disrupt that proceeding.[19]

C. **A Rigid Bright-Line Rule Would Be Unsound Policy.**

Petitioners are frank in their argument that "monopoly" power is "the essence of government itself." (Petitioners' Brief,

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[19] On May 26, 1977 the United States Court of Appeals for the Seventh Circuit joined the Third and Fifth Circuits in their interpretation of *Goldfarb* as applied to public entities. See *Kurek v. Pleasure Driveway and Park District of Peoria*, — F.2d —, 1977-1 *Trade Cases* ¶ 61,448 (7th Cir. 1977), published while this brief was at press.

p. 21.) So it is where the government acts as sovereign to regulate. But why should this monopoly power be extended into a sphere where the entity is not acting as sovereign, *i.e.*, regulating, but conducting a business? Should a company town that engages in the generation of electricity be permitted to restrain trade because it is a municipality? Should a state that takes over a business as a creditor be entitled to conduct that business thenceforth in a monopolistic fashion?

What would happen if a large national corporation were to incorporate a small municipality, a relatively easy matter in Louisiana under La. R.S. 33:31 *et seq.*? Could that corporation then be free to monopolize or restrain trade and commerce in the industry of which it is a part simply by having the municipality, which it controlled, take the requisite action?

Petitioners rely upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) in their attempt to establish the "policy" of the Sherman Act. (Petitioners' Brief p. 24.) There a statute expressly granted an immunity. The Cities, in asking for an absolute immunity without an express statute granting it go too far: There are limits. See *Meat Cutters Local 189 v. Jewel Tea Company*, 381 U.S. 676 (1965); *Connell Construction Co. v. Plumbers & Steamfitters Local*, 421 U.S. 616 (1975).

In reality, the "policy" advanced by petitioners is not truly consistent with the pre-*Goldfarb* decisions of district and appellate courts as petitioners argue. (Petitioners' Brief, p. 16.) There was no consensus on an absolute rule.

The decisions of the courts of appeal and of district courts following *Parker* were not altogether consistent. Nevertheless, with the notable exception of *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) it seems fair to say that, even before *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the trend of cases was toward recognition of possible

antitrust liability on the part of public entities in appropriate circumstances.

The United States Court of Appeals for the Fifth Circuit had noted in *Woods Exploration & Producing Co., Inc. v. ALCOA*, 438 F.2d 1286, 1294 (5th Cir. 1971):

> "The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anti-competitive consequence is truly the action of the state."

This case, however, did not involve any public instrumentality or agency.

Shortly after *Woods*, the United States Court of Appeals for the District of Columbia Circuit was faced with the necessity of interpreting *Parker v. Brown* in a situation involving a football stadium owned and operated by what the court described as an "instrumentality of the District of Columbia." *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 932 (1971). That court concluded a governmental agency was not absolutely immune because "*Parker v. Brown* involves not just state governmental action: it involves regulatory action in the state's capacity as sovereign. . . ." *Id.*, 937. The court concluded that the "instrumentality" of the District of Columbia could be liable under the antitrust laws. *Id.*, 939-940.

Similarly, the United States Court of Appeals for the Sixth Circuit in *Padgett v. Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974), rejected the claim that governmental agencies enjoy an absolute immunity under the antitrust laws:

> "In recent years courts have given considerable attention to Parker v. Brown and have generally rejected '. . . the facile conclusion that action by any public official auto-

> matically confers exemption.' . . . While we similarly reject the proposition of a general governmental immunity, we find it unnecessary to submit *Parker* to an extensive analysis for purposes of the instant case." *Id.*, 1259.

The court, however, concluded that the entity in question was performing "a valid governmental function to which the antitrust laws do not apply" in the "regulation of ground transportation services." *Id.*, 1260.

In this vein, several district courts had ruled against claims of *Parker* immunity by various public entities, including municipal corporations. In *Azzaro v. Town of Branford*, 1974-2 *Trade Cases* ¶ 75,337 (D. Conn. 1974), the court denied a motion by a municipality to dismiss an antitrust claim against it on the grounds of *Parker v. Brown*, 317 U.S. 341 (1943). The court held that, since the state statutes involved did not authorize anticompetitive conduct, there was no antitrust immunity.

In another case, *Fox v. James B. Beam Distilling Company*, 1974-2 *Trade Cases* ¶75,335 (S.D. Ind. 1974), plaintiffs brought suit against the Indiana Alcoholic Beverage Commission (ABC) "a body empowered to regulate vast areas of dealing in alcoholic beverages in Indiana." (p. 98,058.) The defendant state commission filed a motion to dismiss predicated in part on *Parker v. Brown*. The court held that, despite this defense, the complaint stated a claim upon which relief could be granted in that it alleged anticompetitive conduct beyond the regulatory powers given the agency under state law.

The Cities place great weight upon the pre-*Goldfarb* decision of the United States Court of Appeals for the Ninth Circuit in *New Mexico v. American Petrofina*, 501 F.2d 363 (1974) (Petitioners' Brief pp. 6, 14, 15, 18, 19, 22), as establishing the absolute immunity of all state agencies from the antitrust

laws. There the Court expressly disagreed with *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971). See 501 F.2d at 371.

In a suit brought by the United States against the Oregon State Bar, the court, presented with what it found to be "a public corporation and an instrumentality of the Judicial Department", distinguished *American Petrofina* thus:

> ". . . [I]f a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine. However, when the state is not the named defendant, the court must engage in a comprehensive analysis of the legislative will." *U. S. v. Oregon State Bar*, 385 F.Supp. 507, 510 (D. Ore. 1974).

The court held that "[t]here is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of 'state action' immunity." *Id.*, 511.

The Cities also place great weight upon the decisions holding that transportation monopolies, established by various states either for general public transportation or for transportation to and from port or airport facilities, were not subject to the antitrust laws because of *Parker v. Brown*. *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *Ladue Local Lines, Inc. v. Bi-State Dev. Ag. of Mo.-Ill.*, 433 F.2d 131 (8th Cir. 1970). See also *Trans World Associates, Inc. v. City and County of Denver*, 1974-2 *Trade Cases* ¶ 75,293 (D. Col. 1974).

Yet, where a state agency has gone beyond any monopoly granted by state statute and engaged in anticompetitive conduct not specifically authorized by state law, it has been recognized that there may be liability under the antitrust laws. The immunity granted is thus not absolute. In *Allegheny Uniforms v.*

Howard Uniform Co., Gimbel Brothers, Inc., Amalgamated Transport Union Division 85, and Port Authority of Allegheny County, 384 F.Supp. 460 (W.D. Pa. 1974), the court cited *Ladue Local Lines, Inc. v. Bi-State Dev. Ag. of Mo.-Ill., supra*, in acknowledging that the state statute creating the authority might have been intended to create a transportation monopoly, which would have been immune under *Parker v. Brown*, but concluded that such immunity did not extend to requiring its employees to buy uniforms from particular sources in order to get a statutory subsidy.

CONCLUSION

For the reasons set forth herein, Louisiana Power & Light Company respectfully prays that this Court sustain the decision of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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Dated: June 14, 1977

Certificate of Service

I, Andrew P. Carter, Attorney for the Respondent, do hereby certify that I have served the Petitioners with 3 copies of the foregoing Brief for Respondent by mailing the same in a properly addressed envelope with proper postage prepaid to Jerome A. Hochberg, Esq., 1990 M Street, N.W., Washington D.C. 20036, Attorney of record for Petitioners.

This the 14th day of June, 1977.

s/ Andrew P. Carter
Andrew P. Carter

ADDENDUM

ADDENDUM

Extract From the Federal Register, Vol. 40, No. 132, pp. 28877-8 (9 July 1975).

[Docket No. P-556-A]

NUCLEAR REGULATORY COMMISSION
OMAHA PUBLIC POWER DISTRICT

Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters

The Commission has received, pursuant to section 105c of the Atomic Energy Act of 1954, as amended, a letter of advice from the Attorney General of the United States, dated June 23, 1975 a copy of which is attached as Appendix A.

Any person whose interest may be affected by this proceeding may, pursuant to § 2.714 of the Commission's rules of practice, 10 CFR Part 2, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. Petitions for leave to intervene and requests for hearing shall be filed by August 8, 1975 either (1) by delivery to the NRC Public Docketing and Service Section at 1717 H Street, N.W., Washington, D.C., or (2) by mail or telegram addressed to the Secretary, Nuclear Regulatory Commission, Washington, D.C. 20555, ATTN: Docketing and Service Section.

For the Nuclear Regulatory Commission.

ABRAHAM BRAITMAN,
Chief, Office of Antitrust and
Indemnity, Nuclear Reactor
Regulation.

APPENDIX "A"

OMAHA PUBLIC POWER DISTRICT, FORT CALHOUN STATION, UNIT NO. 2, DEPARTMENT OF JUSTICE FILE NO. 60-415-117, NUCLEAR REGULATORY COMMISSION DOCKET NO. P-556-A

June 23, 1975.

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act as amended, in regard to the above-cited application.

Introduction. This is an application to construct an 1150 megawatt nuclear power plant to be located at a site near Blair, Washington County, Nebraska. Since the filing of the application, applicant, Omaha Public Power District (OPPD), and Nebraska Public Power District (NPPD) have entered into an ownership agreement whereby each party will own as tenants in common 50% of the nuclear unit. OPPD and NPPD have agreed to offer ownership shares in the unit to entities within the State of Nebraska which operate electric generating or distribution systems, the aggregate amount of such shares not to exceed 20% of the total capacity of the unit. It is anticipated that the municipally-owned Lincoln Electric System will participate in the unit by owning a minimum share of 150 megawatts, a figure which will be larger if other, smaller entities to whom participation has been offered, decline to participate. The most recent session of the Nebraska Legislature passed legislation specifically authorizing public power districts and municipalities to engage in joint ownership of power plants such as Fort Calhoun, Unit No. 2.

NPPD has not been included in the antitrust review which is the subject of this advice because the necessary information has not yet been received by the Department.

Omaha Public Power District. Omaha Public Power District is an agency of the State of Nebraska.[1] OPPD's most recent peak demand, 1,117 megawatts occurred on July 18, 1974, at which time it had 1,334 megawatts of dependable generating capacity. Peak demand on OPPD's system over the next ten years is expected to nearly double. The bulk of this load growth will be met by the addition of a 575 megawatt fossil-fired unit in 1979 and Unit 2 of the Fort Calhoun Station in 1983.

OPPD serves in extreme Eastern Nebraska in a ten-county area extending north and south along the Missouri River. OPPD's load centers, wholesale and retail, and its generation are tied together by a system of high voltage and extra high voltage transmission lines. A 345 kv transmission line running the length of OPPD's system forms a significant segment of the major transmission line which reaches from Minneapolis, Minnesota to Omaha to Kansas City, Missouri. OPPD and Northern States Power Co., Interstate Power Co., Iowa Public Service Co., St. Joseph Light & Power Co., and Kansas City Power & Light Co. are parties to an interconnection agreement by which the parties engage in coordinated system planning and operations. The agreement provides for the use of the 345 kv interconnection for the sale and exchange of various types of power and energy including emergency energy, scheduled outage power, participation power, diversity interchange, and excess energy.

In addition to the above agreement, OPPD is a participant in the Mid-Continent Area Power Pool Agreement (MAPP), a regional power pool which includes membership by nearly all major electric utilities in a vast area of the Northcentral United States. Through its participation in the MAPP Pool, 345 kv Interconnection Agreement, and other interconnection agree-

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[1] See generally Neb. Rev. Stat. §§70-601 to -680, 70-1001 to -1020, 70-1101 to -1106 (1971).

ments,[2] OPPD is accorded access to the full range of bulk power supply coordinating services and arrangements.

OPPD is also a member of a regional reliability organization, the Mid-Continent Area Reliability Coordination Agreement (MARCA).

Small generating municipalities operating within OPPD's service area, including the cities of Fremont, Blair, Falls City, Tecumseh, and Nebraska City, Nebraska are assisted by interconnection agreements with OPPD. These agreements generally provide the municipalities with partial-requirements service to supplement their own generation, and coordinating services such as emergency service, economy energy, and interchange energy. OPPD has offered ownership shares of the subject nuclear plant to these municipalities, individually and collectively, but at this time it is thought unlikely that such municipalities will elect to participate.

With respect to the matter of wheeling services, there is no recent evidence that OPPD has refused to permit third parties to transmit power over OPPD's transmission facilities. OPPD currently wheels power from the U.S. Bureau of Reclamation to two municipalities in OPPD's area. Moreover, OPPD has assured this Department that OPPD will wheel power, under appropriate terms and conditions, for any utilities in OPPD's area, specifically including Bureau of Reclamation power, power to participants in Fort Calhoun, Unit 2, and power between and among utilities that may themselves install jointly owned power plants.

Regulation of Electric Power in Nebraska. Electricity in Nebraska is generated, transmitted and distributed by public

[2] OPPD is also interconnected with or has contracts with the Nebraska Public Power District, Iowa Power & Light Co., Kansas Gas & Electric Co., Kansas Power & Light Co., and the United States Bureau of Reclamation.

power districts, municipalities, and cooperatives. Unlike most states, there are no privately-owned electric utilities operating in Nebraska. Thus, the typical patterns of competitive conflict found in many states are not present here.

The Nebraska Power Review Board has regulatory jurisdiction over the installation of new generation and transmission facilities in that state, but has only advisory responsibilities over retail and wholesale rates, which are set by the suppliers.

Interconnection and coordination of facilities, including compulsory wheeling over surplus transmission capacity, is also encouraged and declared by statute to be state policy.

Results of Antitrust Review. After investigation of OPPD's conduct in light of the existing market structure in Nebraska, the Department has found no basis upon which to recommend an antitrust hearing.

[FR Doc. 75-17567 Filed 7-8-75; 8:45 a.m.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND
CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I. This Court's Own Decisions Support the Cities' Contention That the Federal Antitrust Laws Are Inapplicable To Municipalities

Goldfarb v. *Virginia State Bar*, 412 U.S. 773 (1975), held that the federal antitrust laws applied to the anticompetitive conduct of an association of private practicing lawyers. Although the Court in *Goldfarb* considered the applicability of the *Parker* v. *Brown*[1] state action doctrine, it determined that the actions of the Virginia State Bar were neither the actions of the state itself nor compelled by the state. In the recent decision in *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), the Court affirmed the holding of *Parker* v. *Brown* that the direct actions of a state agency are outside the

[1] 317 U.S. 341 (1943).

scope of the federal antitrust laws. These cases, and statements in the various opinions in *Cantor* v. *The Detroit Edison Company*, 428 U.S. 579 (1976),[2] confirm that the court below erred in its reading of *Goldfarb* and its ruling that the direct acts of state political subdivisions are subject to the antitrust laws.

The Brief for Respondent filed by Louisiana Power & Light Company ("LP&L"), in an effort to find support for the Fifth Circuit's reading of *Goldfarb*, characterizes the Virginia State Bar's actions as those of a state agency, but that simply does not comport with the analysis in *Goldfarb* or the subsequent decisions of this Court.[3] The City of Lafayette and the City of Plaquemine ("Cities") submit that the Court's opinions themselves provide ample evidence that the *Parker* v. *Brown* state action doctrine has not been altered in cases involving the actions of wholly governmental state entities.[4]

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[2] 428 U.S. at 591; Burger, C.J., concurring, *Id.* at 603-04; Blackmun, J., concurring, *Id.* at 613-14 n. 5; Stewart, J., dissenting, *Id.* at 623, 637-39.

[3] In addition to the cases decided by this Court, LP&L seeks support for its interpretation of *Goldfarb* in recent cases decided by the circuit courts including *Kurek* v. *Pleasure Driveway and Park District of Peoria, Illinois*, 557 F. 2d 580 (7th Cir. 1977). The *Kurek* decision, which held that an Illinois park district and its officials were subject to suit under the Sherman Act, rests on the same infirm reading of *Goldfarb* which led the Fifth Circuit here and the Third Circuit in *Duke & Co.* v. *Foerster*, 521 F. 2d 1277 (3rd Cir. 1975), to erroneous interpretations of the *Parker* v. *Brown* doctrine. *See also* the recent decision of a divided Fourth Circuit in *City of Fairfax* v. *Fairfax Hospital Association*, [1977] 829 Antitrust & Trade Reg. Rep. (BNA) E-1. (No. 76-1775, 4th Cir. Aug. 22, 1977).

[4] Contrary to the government's assertion (Brief of the United States as Amicus Curiae at p. 6), *Parker* v. *Brown* did not differentiate in terms of the applicability of the antitrust laws between a regulatory program and state participtaion in a private conspiracy. Rather, the Court in *Parker* (317 U.S. at 352) was describing a variety of circumstances where state participation or action would not necessarily insulate private parties from the reach of the Sherman Act. Moreover, the Court in that very discussion by referring to "the state or its municipality" *equated* a municipality with a state. Under the government's construction of *Parker* v. *Brown* the state itself would be liable under the antitrust laws if it were engaged in "proprietary" activity that affected interstate commerce, a result which flies in the face of the *Parker* v. *Brown* ruling.

LP&L's argument on the *Parker* v. *Brown* doctrine's application to this case is most notable for what it fails to include. It contains no rebuttal to *Parker's* conclusions as to congressional purpose and provides no authority to detract from this Court's position in *Parker* v. *Brown* that Congress did not intend the federal antitrust laws to apply to actions of the states or their political subdivisions.[5] The Respondent's approach is an attempt to limit *Parker's* holding to the narrowest class of cases involving state legislative commands. But, neither the antitrust statutes nor their legislative histories provide any foundation for such a construction of antitrust coverage. As a general matter legitimate state action cannot be so arbitrarily restricted to the legislative branch. *See, Lombard* v. *Louisiana*, 373 U.S. 267, 273 (1963). In particular, the Court's application of the *Parker* v. *Brown* doctrine in *Bates* v. *State Bar of Arizona, supra*, directly contradicts any

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[5] By rhetorically referring to immunities and the principle that presumptions exist against implicit exemptions to the antitrust laws, LP&L and the amici misstate the issue before this Court. As is abundantly clear from *Parker* v. *Brown*, the issue is the applicability, or not, of the antitrust laws to governmental bodies and not a matter of the exemption or immunization of a party which the Congress otherwise clearly intended to be subject to such laws.

assertion that state legislatures are the only governmental bodies whose acts or directives provide protection from the antitrust laws.

LP&L, while admitting that the federal antitrust laws are inapplicable to one segment of state government, would have this Court rule that the Congress intended a different result for other branches or subdivisions and would urge that Congress intended municipal treasuries to be subject to treble damage liability in suits brought by private corporations. The Cities again submit that the Court's own decisions illustrate that there is no sound basis for the distinctions or the results which LP&L urges.

In *Bates*, the Court found the Arizona Supreme Court to be "the ultimate body wielding the State's power over the practice of law" and thus was "acting as sovereign." 97 S.Ct. at 2697. Louisiana's constitution and statutes delegate plenary power to the Cities for the operation of their municipal electric systems. (Brief for the Petitioners at p. 3 n.2). Analogous for these purposes to the Arizona Supreme Court, the Cities are the ultimate body wielding the state's authority over the provision and regulation of electric utility services both within their boundaries and in their environs. The Cities believe that the critical factor for determining the applicability of the antitrust laws in these cases lies in finding whether the state body charged is indeed a wholly public body, like a municipality, which operates solely for the public welfare and benefit and not for private gain or in favor of private interests. Looking for "sovereignty" tends to confuse this issue. Nevertheless, *Bates* indicates, as the Cities have urged, that "sovereignty" for *Parker* v. *Brown* purposes, at least, may be found in state bodies other

than the legislature. The Cities have also noted that municipalities, as instrumentalities for the convenient administration of state government, exercise locally the sovereign power of the state (Brief for the Petitioners at pp. 13-14), and are, under any standard, entitled to dismissal of LP&L's claims.

Moreover, the *Bates* opinion supports the Cities' reading of *Cantor*, noting that "*Cantor* would have been an entirely different case if the claim had been directed against a public official or a public agency, rather than against a private party." (footnote omitted) 97 S.Ct. at 2697. The Court also noted that *Goldfarb* like *Cantor* is distinguishable from *Bates*, presumably on the ground argued by the Cities here—that *Goldfarb* like *Cantor* involved private not public action. *Id.* at 2696.

II. The Proprietary/Governmental Distinction Is An Inappropriate Standard To Determine the Applicability of the Antitrust Laws To Municipalities

From its more general arguments LP&L moves to the position that these Louisiana cities are subject to prosecution and treble damage liability when they provide the local citizenry with electric service. This conclusion is based in part upon a veiled appeal for the creation of a proprietary/governmental test to determine when municipalities may be sued. LP&L relies upon state judicial characterizations in unrelated cases to argue that each of the Cities is "engaged in private acts for private gain"[6] (Brief for Respondent at p.

[6] To make the point, LP&L quotes three times (Brief for Respondent at pp. 2 n.3, 5 and 20) from a sentence in the district court's opinion which contains a factual conclusion, unsupported by the record, that the Cities' provision of municipal electric services are business activites for profit.

4). It concludes that, by providing this particular service to local citizens, the Cities alter their governmental identity and should be treated for antitrust purposes as if they were privately owned corporations operating for profit.

As an initial response to LP&L's allegations, the Cities must dispel the notion that the municipal electric systems are operated for "profit". While the operation of an electric utility system, like other municipal activities, may produce revenues in excess of costs, these funds do not accrue to the benefit of investors as do the profits of a private corporation. Like any surplus revenues received by the municipalities, be they from the collection of traffic fines or otherwise, they go to defray the costs of other municipal services in lieu of additional taxation. Instead of charging directly for certain services municipalities could, and some do, provide utility, transportation or other services without charge, meeting the costs from general tax receipts. LP&L's "profit" rubric has no substance and cannot change the public character of these Cities for antitrust or any other purposes. In *Springfield Gas & Electric Co.* v. *Springfield,* 257 U.S. 66 (1921), this Court had occasion to review allegations similar to LP&L's, that cities in selling electricity stand like other parties engaged in commercial enterprise. The Court rejected the argument, being keenly aware of the fundamental differences between private corporations and municipal governments and recognizing as to cities that "[s]o far as gain is an object it is a gain to a public body and must be used for public ends." 257 U.S. at 70.

Importation of a proprietary/governmental standard into determinations of the scope of the federal antitrust laws is both unprecedented and unwise. Indeed,

the concept has been uniformly rejected by the circuit courts as a rationale for deciding *Parker* v. *Brown* cases. *See, e.g., City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power & Light Company,* 532 F. 2d 431, 434 n.8 (5th Cir. 1976); *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363, 371-372 (9th Cir. 1974); *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F. 2d 52, 55 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District,* 433 F. 2d 131, 135-137 (6th Cir. 1974).

The proprietary/governmental distinction originated as a judicially created concept arising from cases testing the tort liability of municipalities under state law. Although the distinction has never been addressed by this Court in an antitrust case, it has been discussed and generally criticized in other contexts. In *Trenton* v. *New Jersey,* 262 U.S. 182, 191-92 (1923), it was noted that "[t]he basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class." For a time the concept was used to help resolve questions of state governmental immunity from federal taxation, but this use was ultimately rejected in *New York* v. *United States,* 326 U.S. 572 (1946). There, the Court concluded that "[t]o rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers."

326 U.S. at 580. *See also, Case* v. *Bowles,* 327 U.S. 92, 101 (1946).

This Court's strongest criticism of the proprietary/governmental distinction came in *Indian Towing Company* v. *United States,* 350 U.S. 61 (1955). There the Court refused to apply the distinction to the provisions of the Federal Tort Claims Act that made the United States liable for certain negligent or wrongful acts or omissions of government employees. The Court warned that the position taken by the government would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." 350 U.S. at 65. The Court noted the "irreconcilable conflict" among state decisions on the issue, decisions which "disclose the inevitable chaos when the courts try to apply a rule of law that is inherently unsound." 350 U.S. at 65. Perhaps even more important for this case was the Court's reaffirmation in *Indian Towing* of the extreme difficulty of classifying the actions of governmental bodies.

> [A]ll Government activity is inescapably "uniquely governmental" in that it is performed by the Government. . . . "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 383-384, 68 S. Ct. 1, 3, 92 L.Ed. 10 . . . [I]t is hard to think of any governmental activity on the "operational level," our present concern, which is "uniquely governmental," in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed. 350 U.S. at 67-68.

Notwithstanding the persuasive arguments advanced against the proprietary/governmental distinction in *Indian Towing,* amici have suggested that the concept remains useful for some purposes and should be employed here. In their support, they enlist *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682 (1976), where a minority of the Court accepted a distinction between "governmental" and "commercial" acts of a foreign nation in resolving an act of state question. At issue was the repudiation by Cuba of a trade obligation arising from cigar sales. That case, however, presented significantly different legal and policy considerations from those present here. The act of state doctrine, like the sovereign immunity of nations, was "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal government."[7] Its purpose is to preserve the Executive's control of the nation's foreign policy, respect the constitutional separation of powers and promote the resolution of disputes with foreign nations through diplomatic means.

In reaching his conclusions in *Dunhill,* Mr. Justice White relied in part upon representations of the Executive both as to Department of State policy and specifically that Cuba's actions were not to be considered an act of state. Regardless of whether the conclusions reached by Mr. Justice White would have been different had the Executive been otherwise inclined, it is apparent that *Dunhill* is not a precedent and does not provide a rational basis for application of the proprietary/governmental distinction to this case.[8]

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[7] *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 762 (1972).

[8] Reliance by the amici upon *Bank of the United States* v. *Plant-*

A great number of municipalities in this country operate electric utility systems.[9] Many of them and countless others provide gas, water, sewer and/or transportation services as well. The task of reaching a principled decision as to whether such services are "proprietary" or "governmental" is horrific. As Mr. Justice Frankfurter noted in *Indian Towing, supra,* these are shifting sands. Services once only provided by private entities are now provided by many local governments. In other areas private firms are replacing or supplementing services offered by governmental entities. The dangers of relying on this distinction are obvious and the Court should in this respect follow the lead of the court below and decline to accept the invitation to import the proprietary/governmental distinction into this area of the law. (App. p. 56 n. 8).

III. Concepts of Fairness Do Not Require Application of the Federal Antitrust Laws to Municipalities

Promotion of the proprietary/governmental distinction is closely linked to the second component of LP&L's argument that state political subdivisions

ers' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824) is also misplaced. There the Court held that the mere fact that the State of Georgia was one of the defendant bank's individual corporators did not cause the bank to be treated as the State for purposes of determining the jurisdiction of the federal courts under Article III or the 11th Amendment. The Court's discussion of Georgia's role as a bank corporator has no direct relevance to the applicability of a proprietary/governmental standard in this case.

[9] The Motion of Columbus and Southern Ohio Electric Company, *et al.*, for Leave to File a Brief Amicus Curiae Supporting Respondent Louisiana Power and Light Company (at p. 2) puts the number at 1,750. The Amicus Curiae Brief of National Rural Electric Cooperative Association, *et al.* (at p. 4) states that 2,000 municipalities provide electric utility services.

should be subject to antitrust prosecution when they provide electric utility services. Waving the banner of "fundamental fairness", LP&L argues that it would be unsportsmanlike to treat municipalities differently from investor-owned utilities.[10]

As the Cities illustrated in their Brief for the Petitioners, this goose/gander argument ignores the purpose of the antitrust laws as well as the fundamental differences between private business organizations and government. The different treatment of two classes of institutions under the law is neither a new nor surprising concept. The *Parker* v. *Brown* doctrine itself provides a ready example. Even under LP&L's treatment of the state action doctrine at least some "anticompetitive" acts of state government would be beyond antitrust scrutiny even though a private party would be subject to prosecution for similar acts. Certainly, under *Parker* v. *Brown* and *Bates,* if the State of Louisiana itself were sued under the Sherman Act, there would be no question that the suit should be dismissed. At the same time the State would be permitted to sue for injuries suffered as a result of antitrust violations by private parties. *Georgia* v. *Evans,* 316 U.S. 159 (1942).

Examples of distinctions between governmental and private entities may be found in many areas of federal

[10] For its authority LP&L claims that *Otter Tail Power Company* v. *United States,* 410 U.S. 366 (1973), established that "the antitrust laws would govern the competitive relationship between municipally-owned utility systems and investor-owned utility systems." (Brief for Respondent at p. 20). But, *Otter Tail* did no such thing. There the Court held merely that the Federal Power Act did not immunize privately owned electric power companies from the operation of the antitrust laws. Application of these laws to cities was never discussed.

law.[11] Indeed, some distinctions are constitutionally mandated. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court reaffirmed that the states and their political subdivisions stand on different footing than an individual or corporation with regard to the power of Congress to regulate their activities under the commerce clause.[12] Likewise, in *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380 (1947), the Court found governmental status to be a valid basis for legal distinction.

> It is too late in the day to urge that the Government is just another private litigant, for the purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. (footnote omitted) 332 U.S. at 383-84.

In reality, LP&L's fairness argument is closely akin to the equal protection argument disposed of in *Springfield Gas & Electric Co.* v. *Springfield*, 257 U.S. 66 (1921), where the Court acknowledged the fundamen-

[11] Municipal governments do not pay federal income tax, private corporations do. The interest paid on municipal bonds is not taxed by the federal government, the interest on corporate bonds is.

[12] *Usery* supports the policy arguments offered by the Cities which suggest that the Court should not apply the antitrust laws to the subordinate entities of state government and thereby inhibit and disrupt the essential operations of city governments. (*See*, Brief for the Petitioners at pp. 20-24). The enormous effect which the treble damage judgment sought by LP&L would have on the Cities cannot be gainsaid. Neither can the chilling effect of such a judgment on the thousands of local governmental entities across the nation be underestimated.

tal differences between private and public utilities which the Cities have argued here. As Mr. Justice Holmes observed, municipalities act so that "the public welfare will be subserved" while the private corporation is "organized for private ends". 257 U.S. at 70. Contrary to LP&L's assertions, distinctions between private and public bodies are not only proper but vital to the issue in this case. The antitrust laws were intended to protect the public from abuses of private economic power, not power exercised by public agencies. *Parker* v. *Brown, supra.*

IV. The Policy Considerations Opposed To Application of the Federal Antitrust Laws To Municipal Governments Remain Valid and Compelling

LP&L and the amici make several attempts to counter the Cities' argument that the federal antitrust laws are inappropriate remedies which would disrupt the essential operations of city government. Among other things, the Cities have stressed the fundamental differences between governmental bodies and the private concerns which the antitrust laws were designed to regulate. To illustrate the differences between public and private bodies, the Cities pointed to the political process which is available to curb abuses of public power and insure that the acts of public officials are in accord with the wishes of the citizenry. In assailing these policy considerations, LP&L and the amici have focused attention upon one of the four allegations in LP&L's amended counterclaim—that Plaquemine (a municipality of about 2,550 taxpayers) imposed competitive restraints in the provision of electric service to an unasserted number of customers outside of its municipal boundaries. Their conclusion that customers

outside Plaquemine's city limits are without alternative remedy is, of course, unfounded. It ignores statewide political processes and legal remedies which may be available to aggrieved parties in state courts.[13] The absence under some circumstances of one of several remedies does not overcome the policy considerations for precluding the applicability of the antitrust laws to cities. It remains that the federal antitrust laws with their treble damage and criminal sanctions are an inappropriate means to redress transgressions by public authorities acting in an official capacity.

The Brief for the United States as Amicus Curiae recognizes the devastating effect that treble damage liability could have upon the operations of local government and the exercise of public functions by local governmental officials, and takes the position that this remedy may not be available. Nevertheless, the government takes the view that cities could be subject to injunctions and criminal sanctions. (Brief for the United States at p. 12 n. 13). But the precise legal question presented in this case is whether the Cities are subject to causes of action *and treble damage liability* under the federal antitrust laws. (*See,* Petition at p. 2). Consideration of the consequences of treble damage liability is central to this case and not premature as the government suggests. The effects of treble damage liability are an integral part of the policy considerations that must be weighed in deciding the issue in this case.

[13] The Cities have not attempted to argue and, given the procedural posture of the case, could not argue in this forum the veracity of LP&L's allegations or the propriety of the alleged conduct as a matter of state law or policy. The question is not whether the alleged conduct is for good or ill, but rather whether it is prohibited by certain specific federal statutes when done by a state political subdivision.

In responding to the Cities, LP&L and the amici have also placed reliance upon their assertions of Louisiana law and policy. Such assertions have no direct relevance to the issue here and offer nothing to contradict the strong policy considerations which oppose application of the federal antitrust laws to cities. Nevertheless, we will address these assertions to avoid the confusion they may create.

In the Brief for the Petitioners (at p. 3 n.2) the Cities referred the Court to various Louisiana constitutional and statutory provisions which establish that the Cities are political subdivisions of the State of Louisiana and have been delegated the broadest powers to own and operate municipal electric utility systems. LP&L argues, however, that La. R.S., 33:621 (one of the several statutes granting broad authority to the Cities) includes a provision that the delegated powers are subject to the restrictions imposed by "general law" and that this is evidence that the Cities are subject to the federal antitrust laws." (Brief for Respondent at pp. 16-17). Even if the term "general law" as used in the statute was intended to include the federal law, the applicability of the federal antitrust statutes could not be dictated by the state, *Asheville To-*

[14] LP&L also refers the Court to a recent Louisiana statute, Act 597 of 1975, R.S. 33:1334(G) (Brief for Respondent at p. 17), arguing this to be an expression of the State's general antitrust policy toward municipalities. This provision, part of legislation to allow municipalities and parishes to participate with each other and/or private companies in the construction and operation of electric utility facilities, was passed some time after LP&L filed its counterclaims in this case. The section cited is part of an act to allow the issuance of revenue bonds by joint utility commissions which the legislation authorizes municipalities and parishes to form and has no relevance to the municipal activities attacked by LP&L here.

bacco Board of Trade, Inc. v. *FTC*, 263 F. 2d 502 (4th Cir. 1959); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)."[15]

The Cities also call attention to a matter relating to Louisiana law which was raised in the "Amicus Brief of National Rural Electric Cooperative Association." The brief (at p. 14) cites a February 5, 1975 decision of the Louisiana Public Service Commission ("LPSC") in *Louisiana Power & Light Company* v. *Monroe and the City of Monroe Utilities Commission*, Order No. U-12654, Docket No. U-12654, for the proposition that Louisiana municipalities are subject to the jurisdiction of the LPSC with respect to the operation of their electric systems outside municipal boundaries. As amici have noted in a letter to the Court dated July 29, 1977, however, the LPSC decision was appealed to the 19th Judicial District Court, Parish of East Baton Rouge and reversed on September 14, 1976.

A brief discussion of the appellate court's treatment of the issue may be instructive. In *Monroe and the City of Monroe Utilities Commission* v. *Louisiana Public Service Commission, et al.*, Suit No. 177,757-Division "I" and Suit No. 181, 157-Division "I", the 19th

[15] Moreover, there is evidence that the term "general law" as used by Louisana authorities refers to public acts of the legislature in contradistinction to private acts. *See*, Louisiana Constitution, Article VI, Part V, Section 44(5); *Natchitoches* v. *State*, 221 So. 2d 534 (La. App. 3rd Cir.), *writ denied*, 254 La. 463, 223 So. 2d 870 (1969). In particular, La. R.S. 33:621 makes a municipality's operation of its utility system "subject only to restrictions imposed by general law for the protection of other communities." This indicates not only that the federal antitrust laws are not a part of the "general law" of Louisiana, but also that its meaning in La. R.S. 33:621 is merely to prohibit municipal encroachment on other governmental bodies.

Judicial District Court[16] reviewed the appropriate constitutional and statutory provisions and determined that the legislature had evidenced a "clear and consistent intention to exempt municipally owned and operated public utilities from the jurisdiction of the Commission" and that "[t]his exemption makes no distinction whatsoever as to operations within or without municipal limits." The court concluded further that:

> [T]he Legislature has unequivocally placed the operation, control and regulation of municipally owned public utilities under the exclusive jurisdiction of municipal corporations. Their purpose in so doing was obviously to insure the fiscal integrity and efficient operation of such utilities. This Court does not find any limitation of this authority to only those operations within the territorial limits of the municipality. To the contrary, the statutes extend the exclusive authority of municipal regulation to "service of the public utility within or without its corporate limits." See R.S. 33:4163."

This decision illustrates the plenary power delegated to political subdivisions in Louisiana to operate and regulate their electric utility systems and serves to confirm that they are indeed the "ultimate body wielding the State's power". *Bates* v. *State Bar of Arizona*, *supra*, at 2697.

[16] The text of the 19th Judicial District Court's Opinion is printed as Addendum A to this brief.

[17] On the basis of this ruling of the 19th Judicial District Court the LPSC on January 14, 1977 dismissed a similar proceeding brought by LP&L against the City of Plaquemine. (LPSC Order No. U-12655 in Docket No. U-12655). The text of the LPSC order is printed as Addendum B to this brief.

The Cities submit that the arguments for finding the antitrust laws inapplicable to municipalities are compelling. However, should this Court reject those arguments, there is a more suitable standard for applying antitrust law than a legislative mandate test (be it that of the court below or the even more burdensome test proposed by LP&L and the government). The disruptive effect such a test would have upon the operation of state and local government [18] calls for adoption of a standard more compatible with this nation's federalist structure. If subordinate governmental bodies are ever to be subject to antitrust prosecution, it should be only when they act completely beyond the scope of their general authority. Such a standard, equivalent to the traditional *ultra vires* test, would not look to legislative contemplation or approval of specific acts, but merely to the existence of general operational authority. For example, if a city is authorized to run an electric system or a transportation system, the manner in which it runs the system is not *ultra vires,* and its conduct in engaging in that activity should be beyond the reach of the antitrust laws even though it might be subject to attack on some other ground. This approach would preserve in the states a greater freedom to order their affairs according to local choice, and reduce somewhat the disruptive effects of such a decision upon state and local government.

CONCLUSION

None of the responsive briefs provide any workable solutions to the host of difficulties that would be created by application of the antitrust laws to municipalities, or effectively respond to the policy considerations that

[18] *See*, Brief for the Petitioners at pp. 15-20.

argue against such application. (*See,* Brief for the Petitioners at pp. 15-24). It is indeed impossible to apply the antitrust laws to cities without treading to some degree upon concepts of federalism and interfering with the exercise of local political judgment. It is evident that LP&L and the government are asking this Court to legislate a series of standards for the application of the antitrust laws in ways which Congress certainly never articulated and, the Cities submit, never intended. If the provision of electric and other services by municipalities truly poses a significant threat to our free enterprise economy, appropriate standards and remedies are for the Congress to formulate. Until such time as Congress determines to expand the scope of its legislation, this Court should not reach a decision that would invite substantial additional litigation and enlarge the purview of these punitive statutes to include the actions of municipal governments. Absent an express intention by Congress to include cities under the Sherman Act any policy which interferes with local government and intrudes on fundamental concepts of federalism should not be imputed to the legislative branch.

For these reasons, the Judgment of the United States Court of Appeals for the Fifth Circuit should be Reversed.

Respectfully submitted,

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Dated: September 14, 1977.

ADDENDUM

ADDENDUM A

Suit Number 177,757—Division "I"

19th Judicial District Court

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

THE CITY OF MONROE AND
THE CITY OF MONROE UTILITIES COMMISSION

VERSUS

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL

Consolidated With

Suit Number 181,157—Division "I"

19th Judicial District Court

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

THE CITY OF MONROE AND
THE CITY OF MONROE UTILITIES COMMISSION

VERSUS

LOUISIANA PUBLIC SERVICE COMMISSION

Written Reasons for Judgment

These consolidated cases arise from proceedings before the Louisiana Public Service Commission (the Commission) and pursuant to Section 1192 of Title 45 of the Louisiana Revised Statutes of 1950.

The facts surrounding these cases may be briefly stated as follows.

FACTS

Louisiana Power and Light Company (LPandL) is a privately owned public utility corporation operating under

a franchise outside the city limits of the City of Monroe (Monroe) in the geographical area concerned as well as elsewhere in Louisiana. Monroe is a municipal corporation owning and operating electric light and power and water systems under the auspices of the City of Monroe Utilities Commission (Utilities). Utilities has at all times pertinent to these proceedings engaged in the business of generating, transmitting, distributing and selling electric power and energy and water, both within and without the territorial limits of Monroe.

The factual controversy involved centers around Monroe supplying electricity to a certain industrial park known as Millhaven, located approximately one mile east of the southeastern city limits of Monroe, as well as several other industrial plants and residential customers located outside the territorial limits of Monroe.

Louisiana Power and Light Company initiated these proceedings by filing a petition and rule to show cause with the Commission, alleging that Monroe and Utilities threatened prospective customers in the aforementioned areas with the denial of certain utility services (including water, gas and sewerage) for the purpose of enticing such customers to subscribe to electric service from Utilities. LPandL further alleged that Monroe and Utilities were in violation of LSA-R.S. 45:123, and two general directive orders of the Commission entitled, "In re: Duplication of Electrical Service," and "In re: Promotional Practices." The subject customers were located within three hundred feet of existing facilities of LPandL. This proceeding bears number U-12654 on the docket of the Commission.

In the proceedings before the Commission, Monroe and Utilities filed an exception to the jurisdiction of the Commission as well as an exception of no cause of action. Exceptors averred that the Commission had no jurisdiction over operations of municipally owned and operated public utilities such as they were operating. Exceptors further

claimed that LSA-R.S. 45:123, as well as the general orders of the Commission referred to in the petition and rule to show cause, had no application to their operations.

The Commission overruled the exceptions and, after consideration of the evidence presented at the hearing on the merits, specifically ruled that it had jurisdiction over Monroe and Utilities insofar as their operations outside the territorial limits of Monroe. However, the Commission refused to grant the relief requested by LPandL.

During the pendency of the above proceedings before the Commission in Number U-12654, Monroe and Utilities initiated the above-captioned proceedings numbered 177,757 by filing a petition for injunctive relief prohibiting the Commission from asserting jurisdiction over Monroe and Utilities in the proceedings initiated by LPandL. LPandL intervened and filed exceptions of no cause of action, no right of action and prematurity.

This Court sustained the exception of no cause of action after finding no irreparable injury would result from allowing the proceeding before the Commission to continue. Accordingly, the petition for injunctive relief was dismissed.

Subsequent to the Commission rendering its decision, LPandL filed a petition for appeal and judicial review in the above-captioned proceedings numbered 177,757, seeking a reversal of the Commission's order to the extent that it refused to order Monroe and Utilities to halt construction of their facilities and to cease and desist from serving electricity to the commercial customers in Millhaven. Monroe and Utilities intervened in that proceeding, asking that that part of the Commission's order which LPandL seeks to have reversed be upheld.

In addition to the above intervention, Monroe and Utilities filed the above-captioned matter, numbered 181,157, as an appeal from the Commission's order wherein it held that the Commission had jurisdiction over the City and

Utilities in operating a public utility outside the territorial limits of the City of Monroe.

Due to the common issues of law and fact, the appeals by LPandL and Monroe and Utilities have been consolidated.

In addition to the actual parties to these proceedings, amici curiae briefs have been filed by the Association of Louisiana Electric Cooperatives, Inc., Southwest Louisiana Electric Membership Corporation, the City of Lafayette, and the Municipalities of Houma, Lake Providence, Rayville and Ruston.

Law

There are two basic legal issues presented for this Court's determination. Initially, the Court has been asked to determine whether the Commission had jurisdiction over the subject matter and parties to the proceedings instituted by LPandL. More specifically, can the Commission validly assert its jurisdiction over the operations of a municipally owned utility system to the extent said operations transcend the corporate limits of the municipality. In addition, the Court has been asked to review the Commission's order insofar as it sustains Monroe's and Utilities' continued provision of electrical service through their facilities. Orderly procedure requires that the issue of jurisdiction be considered first.

Article 6, Section 4, of the 1921 Constitution outlines the powers of the Commission as follows:

> "§ 4. Public Service Commission; powers
>
> [Section 4.] The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipelines, canals (except irrigation

> canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, *except as herein otherwise provided;* . . .
>
> "The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission, . . . The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution." (Emphasis added.)

This authority is carried over in the Louisiana Constitution of 1974 in Article 4, Section 21(b), as follows:

> "(B) Powers and Duties. The commission shall regulate all common carriers and public utilities and have such other regulatory authority *as provided by law.* It shall adopt and enforce reasonable rules, regulations and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties *as provided by law.*" (Emphasis added.)

Initially, it must be noted that the above provisions contemplate exceptions to the broad and general powers granted to the Commission. These exceptions will be fully discussed later.

The general powers of the Commission are further set forth in LSA-R.S. 45:1161, et seq. In defining a "public utility" as contemplated therein, Section 1161 provides the following:

"(1) 'Public utility' means any person, public or private, subject to the general jurisdiction of the commission *but not including* carriers by rail, water, electric or motor vehicles or pipe lines, or *public utilities municipally owned or operated* or electric properties owned or operated by rural cooperatives." (Emphasis added.)[1]

The Commission is empowered to exercise its authority with regard to rates and service as set forth in R.S. 45:1163:

"§ 1163. Power to regulate rates and service

The commission shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities; provided, however, that no aspect of direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process, shall be subject to such regulation by the commission."

In defining the extent of the Commission's power, R.S. 45:1164 pertinently provides:

"§ 1164. Extent of power as to service; exception

The power, authority, and duties of the commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utilities.

[1] This definition was amended during the 1975 Regular Session of the Legislature by Act 328 to conform with Article 4, Section 21(C) of the 1974 Constitution. The amendment need not be considered for purposes of this discussion.

The provisions of this Section and R.S. 45:1163 shall not apply to any public utility, the title to which is in the state or any of its political subdivisions or municipalities." (Emphasis added.)[2]

Section 123 of Title 45 of the Louisiana Revised Statutes, as amended, regulates the duplication of electrical services. It provides, in pertinent part:

"The provisions of this section shall not apply to municipally owned or operated utilities of the State of Louisiana or to the parish of Orleans."

As can be gleaned from the above provisions, the Legislature has evidenced a clear and consistent intention to exempt municipally owned and operated public utilities from the jurisdiction of the Commission. This exemption makes no distinction whatsoever as to operations within or without municipal limits.

The power of the City of Monroe to regulate utilities, prior to the effective date of the Louisiana Constitution of 1921, is expressly noted in the original City of Monroe Charter, as amended:

"SEVENTH—To provide an adequate water supply and to erect, purchase, maintain and operate water works and electric and gas light plants, and to regulate the same, and prescribe rates at which water and gas and electric lights shall be supplied to the inhabitants and, also, to construct, own, operate and maintain within and without the City, and within or without the parish of Ouachita, electric street railways and to carry thereon freight and passengers; and to supply electric power to private individuals or corporations for any purpose and to fix the charges therefor."

[2] This definition was amended during the 1975 Regular Session of the Legislature by Act 328 to conform with Article 4, Section 21(C) of the 1974 Constitution. The amendment need not be considered for purposes of this discussion.

Thus, by virtue of its charter, the City of Monroe enjoyed the power to maintain and operate utilities within and without its corporate limits prior to 1921.

The Constitution of 1921, in Article 6, Section 7, with respect to the above municipal authority, provides the following:

> "§ 7. Public service commission; local regulation of utilities; retention or surrender
>
> Section 7. *Nothing in this article shall affect the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, water works or other local public utility, now vested in any town, city, or parish government* unless and until at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors of such town, city, or parish, voting thereon, shall vote to surrender such powers. In the event of such surrender such powers shall immediately vest in the Louisiana Public Service Commission; provided, that where any town, city, or parish shall have surrendered as above provided, any of its powers of supervision, regulation and control respecting public utilities, it may in the same manner, by a like vote, reinvest itself with such powers." (Emphasis added.)

Thus, the Commission's jurisdiction is expressly limited by the Constitution, itself.

Again, this constitutional limitation of the Commission's regulatory power over municipally owned public utilities is recognized and carried over in Article 4, Section 21(C) of the 1974 Constitution:

> "(C) Limitation. *The commission shall have no power to regulate any* common carrier or *public utility owned, operated, or regulated on the effective date of*

> *this constitution by the governing authority of one or more political subdivisions* except by the approval of a majority of the electors voting in an election held for that purpose; however, a political subdivision may reinvest itself with such regulatory power in the manner in which it was surrendered. This Paragraph shall not apply to safety regulations pertaining to the operation of such utilities." (Emphasis added.)

Admittedly there has been no election divesting Monroe's authority to regulate its public utilities.

Furthermore, Article 14, Section 14(m) of the 1921 Constitution authorizes the issuance of bonds by municipalities for the construction and operation of revenue producing public utilities. This provision pertinently provides, in part, the following:

> "The Legislature shall also provide that when bonds are issued hereunder, the issuing subdivision or district must impose rates for the services rendered by the utility fully sufficient to operate and maintain the utility, to pay principal of and interest on the bonds, and to provide an adequate fund for depreciation, improvements and extensions, and provisions may be made for encumbering two or more utilities for the construction, acquisition, extension or improvement of any one or more of the utilities encumbered."

The above provision was continued in the new State Constitution in Article 6, Section 37:

> § 37. Revenue-Producing Property
>
> Section 37.(A) Authorization. The legislature by law may authorize political subdivisions to issue bonds or other debt obligations to construct, acquire, extend, or improve any revenue-producing public utility or work of public improvement. The bonds or other debt obligations may be secured by mortgage on the lands,

buildings, machinery, and equipment or by the pledge of the income and revenues of the public utility or work of public improvement. They shall not be a charge upon the other income and revenues of the political subdivision.

"(B) Exception. This Section shall not apply to a school board."

The Legislature implemented the above authority in R.S. 33:4161, et seq. In connection with this implementation, the following statutory provisions are specifically noted:

"§ 4251. Bond issue

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14, Article 14, of the Constitution of Louisiana, all of which are hereinafter in this Sub-part referred to as 'municipal corporation' or 'municipality' may, in order to construct, acquire, or improve a revenue producing public utility, *either within or without its boundaries,* obtain funds for the purpose by issuing revenue bonds. For the purposes of this Sub-part, the governing body of the municipal corporation shall be the body empowered to authorize and issue other bonds of the municipal corporation under the provisions of Section 14, Article 14, of the Constitution of Louisiana and Title 39, Sub-title 2, Chapter 4." (Emphasis added.)

"§ 4256. Charges for commodities or services provided by utility

When any municipality has issued bonds and has pledged the revenues of any utility for the payment thereof as herein provided, *the municipality shall impose and collect fees and charges for the products, commodities and services furnished by the utility,* including those furnished to the municipality itself and its

various agencies and departments, in such amounts and at such rates as shall be fully sufficient at all times to (1) pay the expenses of operating and maintaining the utility, (2) provide a sinking fund sufficient to assure the prompt payment of principal of and interest on the bonds as each falls due, (3) provide such reasonable fund for contingencies as may be required by the resolution authorizing the bonds, and (4) provide an adequate depreciation fund for repairs, extensions and improvements to the utility necessary to assure adequate and efficient service to the public. *No board or commission other than the governing body of the municipality shall have authority to fix or supervise the making of these fees and charges."* (Emphasis added.)

"§ 4281. Extension or improvement of municipally owned utility by city of 25,000 to 250,000

Any municipality having a population in excess of twenty-five thousand and less than two hundred fifty thousand owning and operating its electric power plant, waterworks, motor coach transportation, and sewerage system, may construct, maintain, extend, rehabilitate, enlarge or improve any municipally owned public utility *either within or without its boundaries.* In addition the municipality may consolidate and unite any non-revenue bearing utility with one or more revenue bearing public utilities, which, when so united and consolidated, shall be one unit and shall be considered and treated as a single revenue bearing utility." (Emphasis added.)

"§ 4287. Charges for commodities or services provided by utility

When any municipal corporation has issued certificates of indebtedness hereunder and has pledged the revenues of any utility for the payment thereof, the

municipality shall impose and collect fees and charges for the products, commodities, and services performed by the utility, in amounts and at rates fully sufficient at all times to

(1) pay the expenses of operating and maintaining the utility;

(2) provide a sinking fund sufficient to insure the prompt payment of the certificates of indebtedness and interest thereon as they fall due;

(3) provide such reasonable funds for contingencies as may be required; and

(4) provide an adequate depreciation fund for repairs, extensions, and improvements to the utility necessary to insure adequate and sufficient service to the public. There shall be no charge for services to the municipality itself or to its agencies and departments. *The governing authority of the municipality or any duly appointed or qualified receiver shall have the exclusive authority to fix or supervise the making of these fees and charges.*" (Emphasis added.)

"§ 4161. Revenue producing public utility defined

For the purposes of this Part, 'revenue producing public utility' means any revenue producing business or organization which regularly supplies the public with a commodity or service, including electricity, gas, water, ice, ferries, warehouses, docks, wharves, terminals, airports, transportation, telephone, telegraph, radio, television, drainage, sewerage, garbage disposal, and other like services; or any project or undertaking, including public lands and improvements thereon, owned and operated by a municipal corporation or parish or other political subdivision or taxing district authorized to issue bonds under authority of Section XIV of Article 14 of the Constitution of Louisiana of

1921, from the conduct and operation of which revenue can be derived."

"§ 4162. Power to own and operate; power to lease

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14 of Article 14 of the Constitution of Louisiana of 1921, may construct, acquire, extend or improve any revenue producing public utility and property necessary thereto, *either within or without its boundaries, and may operate and maintain the utility in the interest of the public.*

A municipal corporation may lease waterworks systems, electric light and power plants, combined water and electric systems, garbage plants, sewerage works, electric street and interurban railways, gas plants and distributing systems.

No municipal corporation may lease or purchase gas fields, wells, lands, or holdings for the purpose of drilling and operating gas wells.

A parish may lease gas plants, gas distributing systems, gas wells, gas lands and holdings." (Emphasis added.)

"§ 4163. Sale and distribution of commodity or service; establishment or rates and regulations

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules and regulations with respect to the sale and distribution." (Emphasis added.)

As can be gleaned from the above constitutional and statutory authorities, the Legislature has unequivocally placed the operation, control and regulation of municipally

owned public utilities under the exclusive jurisdiction of municipal corporations. Their purpose in so doing was obviously to insure the fiscal integrity and efficient operation of such utilities. This Court does not find any limitation of this authority to only those operations within the territorial limits of the municipality. To the contrary, the statutes extend the exclusive authority of municipal regulation to "service of the public utility within or without its corporate limits." See R.S. 33:4163 (quoted supra).

In light of the express language contained in the above authorities of both statutory and constitutional origin, this Court has no alternative but to hold that it was, and is, the clear and unequivocal intent of our lawmakers to exclude from the jurisdiction of the Commission operations of a municipally owned public utility, whether said operations are conducted within or without the municipal limits. A decision to the contrary would be tantamount to a judicial usurpation of the legislative function and a violation of the theory of separation of powers.

In support of its position that the Commission does have jurisdiction, LPandL argues that a determination of jurisdiction by the Commission should be afforded great weight.

This Court is cognizant of the above principle. However, the Court also notes that in the fifty-three years of its existence, the Commission has never before seen fit to attempt to regulate municipalities in the operation of their municipally owned revenue producing utilities. In fact, the Commission has declined to afford non-resident customers relief on the very basis that it lacked jurisdiction. See *Town of St. Francisville* v. *Cobb,* 188 So.2d 46 (La. App. 4th Cir. 1966) Rehearing Denied. Thus, in finding that the Commission lacks jurisdiction in the case at bar, this Court is persuaded by the Commission's own interpretation of the laws it administers. See *Williams* v. *New Orleans S.S. Association,* 341 F.Supp. 613 (La. Dist. ED. 1972).

LPandL further avers that a holding against the Commission on the issue of jurisdiction will result in the denial of equal protection and due process under both State and Federal Constitutions. This argument is without merit. See *Springfield Gas and Electric Company* v. *City of Springfield,* 257 U.S, 66, 42 S.Ct. 24 (1921).

Finally, LPandL cites numerous cases (some of which are foreign to this jurisdiction) that allegedly support a finding of jurisdiction on behalf of the Commission. The Court has reviewed these cases and concludes that they are adverse or inapposite to the circumstances presented herein. Rather, the Court is of the opinion that its finding of exclusive jurisdiction on behalf of the City of Monroe is supported by the weight of the jurisprudence. See *City of Plaquemine* v. *Louisiana Public Service Commission,* 282 So.2d 440 (1972); *Greater Livingston Water Company* v. *Louisiana Public Service Commission,* 246 La. 273, 164 So.2d 325 (1964); *Hicks* v. *City of Monroe Utilities Commission,* 237 La. 848, 112 So.2d 635 (1959); and *Town of St. Francisville* v. *Cobb,* (Supra).

In summary, the Court concludes that the Louisiana Public Service Commission is without jurisdiction over the operations of the Monroe Utilities Commission, a municipally owned public utility, whether such operations are within or without the territorial limits of the City of Monroe. This determination against the Commission on the issue of jurisdiction pretermits judicial review of the findings of the Commission on the merits.

For the above and foregoing reasons, judgment shall be rendered in Suit Number 177,757, entitled *The City of Monroe and The City of Monroe Utilities Commission* v. *Louisiana Public Service Commission, et al,* dismissing petition of Louisiana Power and Light Company at its costs.

Judgment shall further be rendered in Suit Number 181,517, entitled *The City of Monroe and The City of Monroe Utilities Commission* v. *Louisiana Public Service Commission,* in favor of plaintiffs and against defendants,

reversing the Commission's Order Number U-12654 on the basis that the Commission lacks jurisdiction over the operations of the Monroe Utilities Company.

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 14th day of September, 1976.

/s/ Eugene W. McGehee

Eugene W. McGehee, *Judge*

Division "I"

Filed Sept. 14, 1976

ADDENDUM B

Louisiana Public Service Commission

Order No. U-12655

Louisiana Power and Light Company

vs.

The City of Plaquemine

Docket No. U-12655

In re: Alleged duplication of electric service and violation of General Order of this Commission dated March 12, 1974, entitled "Promotional Practices" by the Plaquemine Light and Water System in areas immediately south of Plaquemine, Iberville Parish, Louisiana.

In this proceeding, Louisiana Power and Light Company alleges that the City of Plaquemine engages in the sale of electricity inside and outside of the city limits of Plaquemine and that the city discriminates among its customers outside the city limits by denial of utility service, specifically water, gas and sewerage, in order to persuade them to take electric service from the city. Louisiana Power and Light further alleges that the City of Plaquemine has violated the provisions of LRS 45:123 by repeatedly extending facilities to furnish service within 300 feet of Louisiana Power and Light lines.

The Commission is mindful of the judgement of the 19th Judicial District Court, Parish of East Baton Rouge, in its judgement number 177,757, The City of Monroe and The City of Monroe Utilities Commission versus Louisiana Public Service Commission, et al, and judgement number 181,157, The City of Monroe and The City of Monroe Utilities Commission versus Louisiana Public Service Commission. The Court concluded in its judgement that the Louisi-

ana Public Service Commission is without jurisdiction over the operations of the Monroe Utilities Commission, a municipally owned public utility, whether such operations are within or without the territorial limits of the City of Monroe. It appearing that this Commission is without authority to adjudicate this complaint, this matter is

ORDERED dismissed.

BY ORDER OF THE COMMISSION

BATON ROUGE, LOUISIANA

January 14, 1977

FOR ARGUMENT

No. 76-864

In the Supreme Court of the United States

OCTOBER TERM, 1977

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the federal antitrust laws prohibit some forms of anticompetitive conduct by municipal corporations.

INTEREST OF THE UNITED STATES

The United States has the primary responsibility for enforcing the federal antitrust laws. The question whether those laws apply to anticompetitive conduct that is carried out or arguably authorized by States and their subdivision is of considerable practical importance, and in many instances will determine whether the United States will take action to enforce the antitrust laws and, if so, with what success. The Court invited the United States to participate in briefing and arguing the first case raising the question of the application of the antitrust laws to state action (*Parker* v. *Brown*, 317 U.S. 341), and the United States has participated as *amicus*

curiae in all of this Court's recent cases that raised related issues. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773; *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *Bates* v. *State Bar of Arizona*, No. 76-316, decided June 27, 1977.

STATEMENT

Petitioners, two municipal corporations in Louisiana, operate electric utility systems. They commenced this suit in the United States District Court for the Eastern District of Louisiana, alleging that respondent and three other private electric utilities had violated the federal antitrust laws (A. 6-15). Respondent filed a counterclaim that, as amended (A. 18-20, 24-25, 33-34), alleged that one of the petitioners had violated the federal antitrust laws by agreeing to provide customers outside its city limits with gas and water only if the customers purchased all of their electricity from that petitioner. Respondent sought damages and an injunction against a continuation of the practice (A. 34).

Respondent also alleged that petitioners conspired with an electric power cooperative to engage in vexatious litigation designed to forestall respondent from building a nuclear power generation facility; that petitioners had used covenants in debentures to forbid competition within city limits; and that petitioners had conspired with an electric power cooperative and another private company to provide service for a period longer than allowed by state law. Respondents sought only damages with respect to these allegations.

Petitioners moved to dismiss the counterclaim (A. 22, 42-43). They contended that the federal antitrust laws do not apply to them because they are subdivisions of a State. The district court reluctantly agreed (A. 44-48), believing that the question had been settled by a previous case in the court of appeals. It certified pursuant to Fed.

R. Civ. P. 54(b) that final judgment should be entered on the counterclaim (A. 48-49), and respondent immediately appealed.[1]

The court of appeals reversed (A. 51-58). It concluded that a subdivision of a State is not always exempt from the operation of the federal antitrust laws; the proper question, the court held, is "whether the state legislature contemplated a certain type of anticompetitive restraint" (A. 54) to be imposed by a municipality.

The court of appeals remanded the case to the district court so that it could determine in the first instance whether the Louisiana state legislature contemplated that petitioners might act as they are alleged to have done. The court made it clear that petitioners need not "point to an express statutory mandate for each act which is alleged to violate the antitrust laws.* * * Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is * * * a determination which can be made only under the specific facts in each case." (A. 54, 55-56). The court of appeals explained that if a district court ascertains, "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of" (A. 54-55), then it should conclude that the federal antitrust laws do not apply.

SUMMARY OF ARGUMENT

Petitioners contend that the antitrust laws do not apply to any acts of municipalities. We disagree. There is a presumption against implicit antitrust exemptions, and petitioners' position serves neither the purpose of the antitrust laws nor the purpose of the limited exemption for the acts of a State.

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[1] See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742-743.

The Court has held that the antitrust laws do not prohibit considered decisions by a State, as sovereign, to substitute regulation for competition and to implement those decisions. This principle should apply to decisions of municipalities authorized by the State no less than to decisions of the State itself. Municipalities may act as agents of States, and a rule uniformly applying the antitrust laws to all municipal action would deprive the States of the right to delegate authority in a way that the States have found to be useful. But this does not lead to the conclusion that the antitrust laws are inapplicable to all municipal action. This Court's cases, far from holding that the antitrust laws do not apply to governmental action, disclose that the important question is the degree of state involvement in a decision to supplant competition with regulation.

The States' regulatory authority is fully protected by a rule that the antitrust laws do not apply to properly authorized municipal regulation. Any other rule would require federal policy to yield to a variety of local decisions that may have little to do with an articulable state policy and that even may be contrary to state policy. Municipalities are not themselves sovereign, and they traditionally have been held to the same rules as private entrepreneurs when they engage in proprietary enterprises. There is no reason to suppose that Congress intended to afford municipalities greater immunity than they had at common law.

Petitioners' argument that the proprietary activities of local governments, like their other activities, must be governed exclusively through the political process rings hollow in a case like this. Respondent alleged that one petitioner engaged in anticompetitive activity outside its borders. The anticompetitive activity therefore had effects

on people who could not vote, and the city had every interest to seek to exploit the nonvoters, much as private monopolists seek to profit from nonshareholders.

We submit, in sum, that there is a significant difference between a situation in which a municipality imposes a public regulatory measure and a situation in which public officials violate the antitrust laws in business ventures. In the former situation, a showing that the challenged competitive restraint was within the scope of authority delegated by the state legislature would make out a defense; in the latter, the defendants must demonstrate that their conduct was compelled by the State acting as sovereign.

ARGUMENT

THE FEDERAL ANTITRUST LAWS APPLY TO MUNICIPAL ACTIVITIES THAT ARE NOT AUTHORIZED BY THE STATE AS SOVEREIGN

Petitioners contend that because they are municipalities the federal antitrust laws do not apply to them. In petitioners' view, it makes no difference that they may be engaged in "proprietary" activities, that the State has not manifested an intent to permit them to engage in the sorts of activities alleged to violate the antitrust laws, or that their activities may not serve any ascertainable state purpose. It is enough, they argue, that they are governmental bodies. We disagree. "[T]here is a heavy presumption against implicit exemptions" from the antitrust laws (*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787), and petitioners' position serves neither the purpose of the antitrust laws nor the purpose of the limited exemption for acts of the States.

A. Petitioners' status as governmental bodies is not by itself a sufficient condition for antitrust exemption

Petitioners' argument rests on *Parker* v. *Brown*, 317 U.S. 341, which held that a collaborative raisin marketing program that "derived its authority and its efficacy from the legislative command of the state" (317 U.S. at 350) did not violate the antitrust laws. The Court carefully scrutinized the origin and nature of the program; it found that the program was a considered expression of the will of the state legislature (*id.* at 352), and that an injunction restraining the program would have forbidden the legislature to exercise the sovereign power of the State (*id.* at 346-348, 350-351, 352).[2] Under these circumstances, the Court concluded, the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit" (*id.* at 352).

Parker involved a comprehensive program of business regulation that applied to all of the State's raisin growers. The Court pointed out that a program of regulation was unlike participation by the State in a private conspiracy in restraint of trade (317 U.S. at 351-352).[3] Similarly, the Court has held in *Bates* v. *State Bar of Arizona*, No. 76-316, decided June 27, 1977, that a State acting as sovereign does not violate the antitrust laws by regulating the conduct of attorneys. In *Bates*, as in *Parker*, the highest authority of a State had made and implemented a considered decision to substitute regulation for competition.

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[2]See also *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 591 n. 24 (plurality opinion).

[3]The Court cited with approval (317 U.S. at 352) *Union Pacific R.R.* v. *United States*, 313 U.S. 450, which held that a city violated a federal statute when it offered certain concessions to merchants who agreed to move their business to the city's new marketplace. Although the city acted to promote what it perceived to be the economic welfare of the community, the Court held that it had joined a private conspiracy initiated by a railroad and consequently was exposed to sanctions under federal law.

Bates made clear what had been implicit in *Parker*: the extent to which the federal antitrust laws apply to governmental action depends on the nature of the governmental decision involved. The Court emphasized that the Supreme Court of Arizona, which had formulated the program of regulation, was "the ultimate body wielding the State's power over the practice of law" (slip op. 8) and that the restraint was uniformly imposed by the sovereign power of the State. The program of regulation not only was an exercise of traditional regulatory power but also represented "a clear articulation of the State's policy with regard to professional behavior" (slip op. 10). The rules were subject to continuing reevaluation by a detached body (*ibid.*), and the Court explained (slip op. 11) that "[o]ur concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."

Parker and *Bates* establish that a considered decision by the State to use its governmental powers to substitute a system of regulation for the forces of free competition, and its implementation of that decision, do not violate the federal antitrust laws. Petitioners contend that *Parker* stands for a much broader principle: that no activity of a governmental body can violate the antitrust laws. But the care with which the Court scrutinized the activity in *Bates* undercuts petitioners' arguments; the involvement of a governmental body is a necessary but not a sufficient condition of this form of antitrust immunity.

The simplistic position advanced by petitioners is at odds with several other decisions of this Court applying federal antitrust laws to activities supported by governmental bodies. For example, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, holds that States

may not authorize private parties to enter into anticompetitive contracts; a State may establish a system of regulation, but it may not extend a blanket antitrust immunity to otherwise unregulated parties. Moreover, even within the traditionally regulated professions and industries, the federal antitrust laws have substantial importance, as the Court held in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, and *Goldfarb* v. *Virginia State Bar*, *supra*.

In *Cantor* a private utility filed a tariff with a public utilities commission; once the tariff had been approved, the utility was compelled to adhere to its provisions. The Court looked beyond the fact of governmental compulsion and concluded that the activity involved had been initiated by a private party and did not serve to carry out a governmental policy; the State "had no independent regulatory interest" (*Bates*, *supra*, slip op. 9) in the course pursued by the utility company, and the antitrust laws were applied to the utility's actions.

In *Goldfarb* the Court held that the antitrust laws prohibited the establishment of minimum fee schedules by the bar. The bar traditionally has been a regulated profession, and the State Bar, which established the fee schedules, was for at least some purposes a "state agency by law" (421 U.S. at 790).[4] Yet the Court concluded that the federal antitrust laws applied because the "State acting as a sovereign" (*Bates*, *supra*, slip op. 8) did not command the establishment of minimum fees. It explained (421 U.S. at 790, emphasis added): "The *threshold* inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State *acting as sovereign*."

[4]Petitioners contend (Br. 5, 10-12) that the Court treated the State Bar in *Goldfarb* as a private party, and that the case therefore is not helpful in determining the application of the antitrust laws to governmental units such as municipalities. But the Court recognized that the State Bar was a unit of government for *some* purposes (421 U.S. at 789-790); it was simply not acting in a governmental capacity in establishing minimum fee schedules. *Goldfarb* undermines petitioners' argument that a body exercising governmental authority for some purposes is immune from antitrust liability for all of its activities.

In sum, this Court's cases, far from holding that the antitrust laws do not apply to any action by governmental bodies, disclose that the important question is the degree of state involvement in a decision to supplant competition with regulation. A municipality that implements a regulatory measure authorized by the State as part of the governmental power delegated by the States does not violate the antitrust laws.[5] In any other event, however, some further inquiry is necessary.[6]

B. Municipalities acting in a proprietary capacity often should be subject to the antitrust laws

The federal antitrust laws were "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356

[5]This principle does not apply when a self-regulatory body that is a governmental body for some purposes exercises its discretion in a manner that may be influenced by private financial considerations. When the action is essentially private the standard generally applicable to private competition should be applied. See *Goldfarb*, *supra*; cf. *Gibson* v. *Berryhill*, 411 U.S. 564.

[6]We believe, however, that a municipality may determine that it will be the sole provider of certain services within its borders without exposing itself to antitrust liability. Similarly, it could offer services at subsidized prices to accomplish public purposes without violating federal law.

U.S. 1, 4. Because of the "felt indispensable role of antitrust policy in the maintenance of a free economy," this Court has repeatedly held that "immunity from the antitrust laws is not lightly implied." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348.[7]

The antitrust laws were not intended to preempt regulatory programs carried out by state officials, however, and it therefore is appropriate to construe the antitrust laws to make room for the traditional activity of municipalities engaged in the regulation of private parties. A refusal to recognize any distinction between municipally imposed and privately imposed restraints would interfere with the States' selection of the subordinate public bodies to carry out governmental functions; the States must act through agents, and States have chosen to delegate a significant portion of their regulatory authority to municipal governments. To apply the federal antitrust laws to all municipal decisions would be to hold, in practical effect, that certain state powers are not delegable.

Such a position would be unwarranted. The allocation of governmental power within a State is a matter of state law (*Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210), and a State should be free to allocate governmental authority to its political subdivisions in a manner that it believes best serves the interests of its people. Consequently, when municipalities act in a conventional public regulatory capacity, as the duly authorized representative of the States for such purposes, they are not subject to the federal antitrust laws.

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[7]See also *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719-720; *Goldfarb* v. *Virginia State Bar*, *supra*, 421 U.S. at 787; *California* v. *Federal Power Commission*, 369 U.S. 482, 485.

It does not follow from this, however, that the federal antitrust laws do not apply at all to municipal action. This Court has held that "[t]he mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws." *Cantor* v. *Detroit Edsion Co.*, *supra*, 428 U.S. at 596. When a conflict is no more than a contingent possibility, the Court has sought to serve antitrust policy by applying the antitrust laws with due consideration for the competing interests.[8] It should do so here as well.

The policy of preserving to the States the traditional authority they have exercised to regulate their economies does not require granting antitrust immunity to all actions of municipalities and related agencies. The States' regulatory prerogatives may be protected by holding that the antitrust laws do not apply to traditional governmental conduct authorized by a delegation of the State's regulatory authority to its political subdivisons.

Any other rule would require federal policy to yield to a variety of local decisions that may have little to do with an articulable state policy and that may be severely detrimental to the interests protected by federal law.[9] Municipalities are not sovereign in their own right.[10] The Eleventh Amendment does not cloak them with

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[8]See *United States* v. *National Association of Securities Dealers*, *supra*; *Silver* v. *New York Stock Exchange*, 373 U.S. 341.

[9]See *Kurek* v. *Pleasure Driveway and Park District of Peoria*, C.A. 7, No. 76-1791, decided May 26, 1977.

[10]See *Waller* v. *Florida*, 397 U.S. 387; *Hunter* v. *City of Pittsburgh*, 207 U.S. 161; *Atkin* v. *Kansas*, 191 U.S. 207.

immunity to suit in federal court.[11] Municipalities traditionally have been held bound by the same rules as private persons when they engage in business enterprises.[12] Because municipalities never have been treated as equivalents of the States themselves, there is no reason to suppose that Congress would have equated States and municipalities, or hesitated to subject municipalities to suit when they acted in a proprietary capacity.[13]

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[11]See, *e.g.*, *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274.

[12]Kramer, *The Governmental Tort Immunity Doctrine in the United States, 1790-1955*, 1966 U. Ill. Law Forum 795, 815-819; 12 McQuillin, *Municipal Corporations* § 35.35 (1970); 18 McQuillin, *supra*, at § 53.01

[13]Petitioners raise the specter that exposure to treble damage liability would cripple the operations of local governments and chill the exercise of discretion by governmental officials (Br. 20-24). But this argument, whether or not it is correct, would support only immunity from damages and not immunity from injunctions or criminal sanctions in appropriate situations. Injunctions and criminal sanctions have been allowed even in circumstances traditionally considered to call for absolute immunity from damages. See, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (prosecutors); *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (judges). Moreover, the question of immunity from damages in exceptional circumstances—a question raised but not decided in *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 598-603 (plurality opinion), 614-615 n. 6 (Blackmun, J., concurring)—is not yet presented by this case. The court of appeals remanded the case to the district court to determine the extent to which petitioners' conduct was exempt from the federal antitrust laws, and it would be premature to consider, in advance of the district court's decision, whether petitioners should be required to answer in damages for activity that has not yet been found to be covered by the antitrust laws. Any decision concerning the proper extent of damages liability should take place after the scope of antitrust coverage has been determined, for only then could the potential effects of damages awards upon municipalities and their officials be assessed accurately.

It cannot be said that every act of a city is necessary to the regulatory power of the State, particularly when the city acts in a proprietary capacity. Indeed, cities may act in defiance of the State's policy, and when that happens no state interest is served by withholding application of the federal statutes. Louisiana, in fact, clearly distinguishes a city's action in a proprietary capacity from action in a governmental capacity and exposes cities to liability for proprietary action.[14] There is no reason to conclude that Congress intended some broader immunity for petitioners than Louisiana itself contemplated.

Petitioners contend that the distinction between proprietary and governmental actions of municipalities has lost its vitality,[15] but the argument is overstated. Although the distinction may be unimportant for some purposes,[16] it retains its value for others[17] and has particular force when only statutory rules are involved. Congress and this Court have employed the distinction when dealing with the immunity of foreign nations from suit in courts of

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[14]See *Hicks* v. *City of Monroe Utilities Commission*, 237 La. 848, 112 So. 2d 635; *Vicksburg, S. & P. Ry. Co.* v. *City of Monroe*, 164 La. 1033, 115 So. 136. See also La. Rev. Stat. Ann. § 33:1334(G) (Supp. 1977), which denies municipal joint ventures "immunity • • • from any antitrust laws of the state or of the United States." So far as the State of Louisiana is concerned, then, petitioners are in some respects simply private entrepreneurs that also happen to have governmental functions.

[15]See Reply Br. in Support of Pet. 3-4; Br. 22 n. 17.

[16]See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65.

[17]See, *e.g.*, *National League of Cities* v. *Usery*, 426 U.S. 833, 845 (Congress may not interfere with certain decisions of "States as States," made "in order to carry out their governmental functions"); *id.* at 854-855 and n. 18 (Congress may regulate State activity that is not an integral part of governmental functioning). *National League* distinguished proprietary functions (such as running a railroad) from "those governmental [functions] which the States and their political subdivisions have traditionally afforded their citizens" (*id.* at 855). The provision of electricity is not a traditional function of government. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-353; *Cantor* v. *Detroit Edison Co.*, *supra*.

this country,[18] and, as we have discussed, Louisiana finds it useful when dealing with municipal corporations such as petitioners.[19] Here, as in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.[20]

Petitioners argue that even proprietary activities by municipalities inure to the benefit of the general public and must be controlled exclusively through the democratic process (Br. 23). Whatever force this argument

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[18]See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682. See also the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891.

[19]See text and notes at notes 12-14, *supra*.

[20]Every court of appeals that has considered the question after *Goldfarb* has concluded that the antitrust laws reach at least some proprietary conduct by governmental bodies. In addition to the instant case, see *Kurek* v. *Pleasure Driveway and Park District of Peoria*, *supra*; *Duke & Co., Inc.* v. *Foerster*, 521 F. 2d 1277 (C.A. 3). *State of New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (C.A. 9), upon which petitioners rely, was decided before *Goldfarb* and we submit that, to the extent it is inconsistent with the principles discussed in this brief, it is incorrect. As the Seventh Circuit concluded in *Kurek*, *supra*, slip op. 11: "*Cantor* and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based 'rule' that antitrust inquiry ends upon * * * a finding of governmental actions or laws being involved."

may have when the effects of a municipality's deeds are confined within its geographic borders, it has little bearing on this case. Respondent has alleged that the City of Plaquemine restricted competition outside its borders by denying gas and water to persons who bought electricity from respondent (A. 33-34). The anticompetitive activity alleged here therefore had effects on persons who could not vote in the City's elections, and the residents of the City had every interest to seek to exploit the non-voters much as a private monopolist seeks to profit from nonshareholders.

Even when anticompetitive activity seems to take place within narrow geographic confines, its effects may be felt elsewhere.[21] Unless petitioners' conduct is authorized by and in harmony with legitimate determinations of state policy concerning the role of competition in the delivery of utility service, there is no legitimate reason to exclude it from the coverage of the federal antitrust laws.[22]

Under the principles we have discussed, there is a significant difference between a situation in which a municipality adopts a public regulatory measure to regulate private conduct and a situation in which public officials join in as entrepreneurial conspirators. In the former situation, a showing that the challenged competitive restraint was within the scope of authority delegated by the state would establish a defense; in the latter, the defendants

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[21]See, *e.g.*, *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738; *Goldfarb* v. *Virginia State Bar*, *supra*, 421 U.S. at 783-785.

[22]When municipalities act as the sole providers of services within their borders, different considerations apply. See note 6, *supra*.

must demonstrate that their conduct was compelled by the State acting as sovereign.[23]

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[23]Petitioners argue that the test would be impossible to apply because it is often difficult to determine the authority of local governments. But there would be no need for resort to explicit legislative history in most instances, and the courts should have little difficulty in concluding that the States delegated to subordinate agencies their traditional powers, even if the grant is ambiguous. When municipalities venture outside the usual governmental realm, however, they will need to be more careful and thoughtful before engaging in potentially anticompetitive actions—the very consequence antitrust policy should encourage.

The Court need not decide in this case whether restrictive conduct by limited-purpose governmental entities should be assessed by the same standards of authorization of the challenged conduct that are appropriate in the case of municipalities. Assumptions concerning the State's intent broadly to delegate authority to municipalities or other general purpose political subdivisions may not be valid with respect to limited purpose political entities. In the latter case, a more specific showing of authorization may be necessary to ensure that federal antitrust policy is not superseded by decisions that do not, in fact, represent the will of the State acting as sovereign. In any event, as indicated *supra* at note 5, where the defendant, though a state agent for some purpose, is also a self-regulatory body, antitrust exemption should only be found where the restrictive conduct is required by the State. See *Goldfarb* v. *Virginia State Bar*, *supra*.

Because this case involves a claim that cities have themselves violated federal law, we express no opinion on the question whether a program of regulation formulated or administered by a city that compels private parties to behave anticompetitively must sometimes yield, under the Supremacy Clause of the Constitution, to the federal policies embodied in the antitrust laws. Cf. *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 609-612 (Blackmun, J., concurring); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y. U. L. Rev. 693, 732-737 (1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
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BARRY GROSSMAN,
CATHERINE G. O'SULLIVAN,
Attorneys.

JULY 1977.

In The

Supreme Court of the United States

October Term, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, ET AL. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Movants identified below hereby respectfully move for leave to file a brief as *amicus curiae* in support of Louisiana Power & Light Company in the afore-captioned proceeding. The attorneys for Louisiana Power & Light Company have consented to the filing of the brief, but the attorneys for Petitioners, the Cities of Lafayette and Plaquemine, Louisiana, have refused consent.

Movants and Pertinent Related Information

National Rural Electric Cooperative Association, ("NRECA") 2000 Florida Avenue, N.W., Washington, D.C., 20009. NRECA is the national trade-service association of its approximately 1,000 members, which are comprised preponderantly of rural electric distribution cooperatives but also of bulk power supply cooperatives, statewide trade-service associaitons of electric cooperatives and other related types of entities. (All of the additional Movants listed following are members of NRECA.)

Georgia Electric Membership Corporation, ("GEMC") 148 Cain Street, Suite 845, N.E., Atlanta, Georgia, 30303. GEMC is the statewide trade-service association of all of the 42 distribution electric cooperatives corporately sited and operating in that state.

Association of Illinois Electric Cooperatives, ("AIEC") 6460 South Sixth Frontage Road, Springfield, Illinois, 62708. AIEC is the statewide trade-service association of all of the 28 distribution electric cooperatives as well as the two power supply electric cooperatives corporately sited and operating in that state.

Association of Louisiana Electric Cooperatives, Inc., ("ALEC") 10725 Airline Highway, Baton Rouge, Louisiana, 70816. ALEC is the statewide trade-service association of 13 of the 14 distribution electric cooperatives and the one power supply electric cooperative corporately sited and operating in that state.

North Carolina Electric Membership Corporation, ("NCEMC") 3333 North Boulevard, Raleigh, North Carolina, 27611. NCEMC is the statewide trade-service association and power supply agent of all of the 28 distribution electric cooperatives corporately sited and operating in that state.

Oklahoma Association of Electric Cooperatives, Inc., ("OAEC") 2325 N.E. Expressway, Oklahoma City, Oklahoma, 73111. OAEC is the statewide trade-service association of all 27 of the distribution electric cooperatives and of the two power supply electric cooperatives operating in the State of Oklahoma, all but one of which (Arkansas Valley Electric Cooperative, Ozark, Arkansas) are corporately sited in that state.

South Carolina Electric Cooperative Association, Inc., ("SCECA") 808 Knox-Abbott Drive, Cayce, South Carolina, 29033. SCECA is the statewide trade-service association of 17 of the 18 distribution electric cooperatives and of the two power supply electric cooperatives corporately sited and operating in that state.

Texas Electric Cooperatives, Inc., ("TEC") 8140 Burnet Road, Austin, Texas, 78766. TEC is the statewide trade-service association of 78 distribution electric cooperatives and two power supply electric cooperatives corporately sited and operating in that state.

Virginia Association of Electric Cooperatives, ("VAEC") 5601 Chamberlayne Road, Richmond, Virginia, 23227. VAEC is the statewide trade-service association of all of the 15 distribution electric cooperatives corporately sited and operating in the State of Virginia, of both of the distribution electric cooperatives corporately sited and operating in the State of Maryland, and of the one distribution electric cooperative corporately sited and operating in the State of Delaware.

Fairfield Electric Cooperative, ("Fairfield") P. O. Box 150, Winnsboro, South Carolina, 29180. Fairfield is a distribution electric cooperative corporately sited and operating in the State

of South Carolina. It is a member of SCECA and NRECA. Sioux Valley Empire Electric Association, ("Sioux Valley") Colman, South Dakota, 57017. Sioux Valley is a distribution electric cooperative corporately sited and operating in the State of South Dakota. It is a member of NRECA.

The some 1,000 member rural electric cooperatives comprising NRECA's membership are located in 46 of the 50 states, including Alaska. They range in size of patron membership from only a few hundred to as many as 50,000, but the average size is in the order of about 9,000. Altogether, they furnish electric service to over 8,000,000 meters—residential, farm, commercial, institutional, Governmental and industrial — representing an estimated 25,000,000 men, women and children in the United States.

Interests and Grounds for Motion

The question presented for determination by the Court in this case is whether state-created municipalities are immune to the proscriptions of the Sherman Act, 15 U.S.C. §§ 1 *et seq*. The issue arose in litigation between Louisiana Power & Light Company and the two Petitioner Cities in Louisiana, and involved, generally, charges and countercharges of antitrust conduct relating to competition between the litigants in the business of selling electric service.

The Respondent Company is a privately owned public utility operating for profit in the State of Louisiana. These Movants, including particularly the distribution and power supply electric cooperatives which are actually moving parties or which are the members of and represented by the Movant associations, are similar in some respects but substantially dissimilar in others to the Respondent Company and similar investor-owned public utility companies. Both types of entities are engaged in the business of furnishing and selling electric service to the public, but there the similarities virtually end. The following dissimilarities constitute one of the major reasons these Movants respectfully say to the Court that, while they

have direct interests in the outcome of this case, those interests will not be adequately represented by the Respondent Company:

Both distribution and power supply electric cooperatives are organized, almost invariably, under special enabling acts of their respective states—that is, enabling acts that are different from the acts under which investor-owned profit electric public utility companies are incorporated. These acts invariably command the cooperatives to operate on a non-profit basis or at as near cost as is consistent with sound business principles. (This does not mean that they are prohibited from realizing an *economic* profit, but that they cannot realize a legal, taxable profit—that is, they cannot so operate that revenues are derived from one group of persons and the excess thereof over expenses distributed as dividends or interest payments to a different group of persons.)

A further dissimilarity is that every one of such distribution and power supply cooperatives has been debt financed by loans from the United States Rural Electrification Administration ("REA"), pursuant to the Rural Electrification Act of 1936, as amended. 7 U.S.C. §901 *et seq.* The REA Administrator may make loans to these cooperatives only for the purpose of furnishing electric service to persons in "rural areas" who are not receiving central station service. 7 U.S.C. §902. The term "rural area" is defined to mean "any area . . . not included within the boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants . . ." but the term includes "both the farm and nonfarm population" of such areas. 7 U.S.C. §913.

In addition to the federal "rural area" limitations as set forth foregoing, many of the individual state enabling acts contain the same or comparable limitations. The general effect of these federal and state limitations is to impose a substantial restriction on the ability of these cooperative systems to attain and maintain economic feasibility. Such limitations have been

augmented by proliferate litigation in many states where cooperatives are sued (often successfully, including in the State of Louisiana) for the purpose of compelling them to remove their facilities or yield up their going business operations in areas which have become newly annexed within the corporate limits of municipalities.

Thus, the anti-competitive practices which lie at the core of this case, and the overriding question whether those practices by a municipality are subject to the sanctions of the Sherman Act, are of crucial concern to the Movants.

Movants respectfully submit that, from their differentiated posture in the industry and in the industry practices involved in the central legal issue presented in this case, they have unique concerns with respect to the resolution of that legal issue, they will be directly affected by this Court's resolution of that issue, and they are in position to shed different and important light on that legal issue in aiding the Court to reach its decision herein.

Repectfully submitted.

CRISP, BOLCH, SMITH, CLIFTON & DAVIS

William T. Crisp

William T. Crisp

May, 1977

CERTIFICATE

I hereby certify that two copies of the foregoing Motion have been served on counsel of record for all parties to this proceeding by placing the same in the United States mail, postage prepaid, this ..... day of May, 1977.

William T. Briggs

In The

Supreme Court of the United States

October Term, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent

AMICI CURIAE BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, ET AL.

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Respondent

AMICI CURIAE BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION ("NRECA"), ET AL.*

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*The names and addresses and certain pertinent related information of all the *Amici Curiae* are set forth in Appendix "A" of this brief. These *Amici Curiae* will hereafter ordinarily be, collectively, called "Cooperatives," or, singularly, "Cooperative."

INTERESTS OF THE AMICI CURIAE IN THIS PROCEEDING

The some 1,000 rural electric cooperatives comprising NRECA's membership are located in 46 of the 50 states, including Alaska. Each of the other *Amici Curiae* is a member of NRECA. Each of the distribution electric cooperative members of NRECA furnishes retail electric service to as many as 50,000,

and to as few as only a very few hundred, patron-members, the average size of these distribution electric cooperatives being in the order of only 9,000 patron-members. Altogether, the distribution electric cooperatives furnish electric service to over 9,000,000 meters — residential, farm, commercial, institutional, governmental and industrial — representing an estimated 25,000,000 men, women and children in the United States. *See 1976 Annual Statistical Report, Rural Electrification Borrowers,* Rural Electrification Administration, United States Department of Agriculture (REA Bulletin 1-1).

The Cooperatives came into existence beginning in the mid 1930's, although it was not until after the end of World War II that their growth to maturation was accomplished. They came into existence because in the nation's rural areas electric service was unavailable from the two other major types of entities engaged in the retail electric business, the investor-owned power companies, such as the Respondent, and the municipal electric systems, such as the Petitioners.

Due to the relatively higher cost (i.e., fewer customers per mile of line / higher investment per installation) of extending and furnishing electric service in the rural areas, the Federal Government, initially by executive order of President Franklin D. Roosevelt in 1935 and then, permanently, by a formalized act of Congress on May 20, 1936, 49 Stat. 1363, *et seq.*, 7 U.S.C. §901, *et seq.*, inaugurated the national rural electrification program. The cardinal means by which this program was to be developed—its objective being to make service available on an economically feasible basis to all rural segments of our society—was the lending of capital funds to electric cooperative corporations and others so as to enable them to finance, over long terms and at reasonable interest rates, the construction of electric facilities. In order to assure that this new national objective was directed to the rural areas only, the Congress restricted the Rural Electric Administration Administrator (hereafter "REA" and "Administrator", respectively) so as to permit him to lend funds for the construction of facilities to

serve only those persons in "rural areas" who were not receiving central station service. 49 Stat. 1363; 7 U.S.C. §902. The term "rural area" was defined to mean "any area . . . not included within the boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants . . ." but the term includes "both the farm and nonfarm population" of such areas. 49 Stat. 1367; 8 U.S.C. §913.

Both before REA's inception and since, America has been a burgeoning society—in virtually every sense: population, industrially, gross national product, new and expanded cities and, since REA's inception, even two new states. The long, pent-up need and desire for electric service on the part of the nation's rural people impelled tremendous and optimistic grassroots response to accomplish REA's objective. Unfortunately, (or fortunately, depending upon one's position on the matter) the federal program of rural electrification had the effect of suddenly awakening what until that time had been two apparently "sleeping giants"—the investor-owned electric utilities and many municipal electric systems throughout the land.

What happened is of such common knowledge that we respectfully submit this Honorable Court should take cognizance thereof: All of these three kinds of entities—Cooperatives, investor-owned utilities and municipal electric systems—began a "race" to extend and furnish electric service to those rural sections of the nation which, because they were the most densely populated, offered promise of greatest financial feasibility. While the result was that the great majority of the Cooperatives were deprived of the economic benefits of serving some of the then more profitable segments of the national rural society (with the consequence that their cost of operation and therefore their supporting retail rates were higher than they otherwise would have been), the national objective of electrifying rural America was accomplished.

Today, with few and negligible exceptions, electric service is available to every person who desires it and to virtually any

locale in which new premises might locate and there create a new need for it. (Lest it be inferred otherwise, we hasten to state that, while the great majority of rural Americans and even greater prepondance of America's rural *geographic areas* are being served by the Cooperatives, a substantial number of rural Americans, especially those living in the more thickly settled rural areas, are served by some 200 major investor-owned utilities and by a good many of the some 2,000 municipal electric systems. *See National Power Survey,* Federal Power Commission, Vol. I, 1964.)

Nonetheless, the successful expansion of the electrical industry in America so as to make service available to virtually every inhabitant and locale was and is generally characterized by a vigorous competition at the retail level, unless and except to the extent that the states, through their respective regulatory processes or otherwise, have brought a halt or substantial retardation to the almost predatory competition that has prevailed. (We shall have need later in this brief to allude to this increasing effort on the part of the states. Suffice it to say, here, that the competition among cooperatives, power companies and municipalities at the retail level has not always featured the use of Queensberry Rules, much less impartial regulatory referees.)

The continuing burgeoning of our society and the related socio-spacial-economic dynamics that have attended it have inevitably spawned direct, combative confrontation of these competing institutions. The record before this Court is not replete with even allegations, much less supporting proofs, to demonstrate the many ways in which and the degree to which this combat has been taking place. We respectfully put it to the Court, however, that the record, together with the sheer number and nature of these *Amici Curiae,* makes it clear that the one and only issue of law involved in this stage of this proceeding, commands a wide-spread national concern; and that it simply could not command such a concern unless the evils about which the Respondent has counterclaimed were

pervasive and, to those many competing entities which are the targeted victims of those evils, profoundly damaging.

Many, indeed most, states afford one degree or another of regulation and territorial protection to both the investor-owned utilities and the electric cooperatives (and, in a very few states, to municipal electric systems.) (*See Legal Aspects of Territorial Protection for REA Financed Cooperatives,* U.S.D.A. General Counsel, pp 71-165, January, 1970, for state statutes enacted on this subject since January, 1970, See Appendix "B" of this brief.) But, with respect to areas to which Cooperatives pioneer electric service but thereafter become annexed by municipalities of over 1,500 population, state laws, as we shall see, afford different kinds and degrees of protection (usually, only limited protection and sometimes worse than none at all). The municipal practice of pursuing tie-in arrangements, (a *per se* violation of the Sherman and Clayton Acts, *infra,*) is such that, predictably, it has an effect upon first, the suburbanization, and finally, the urbanization of what were once characteristically rural communities. This is true for the very simple reason that other municipal services, such as water, sewage, gas and garbage collection, come into an area only because a new customer is willing to meet the compelled condition of taking municipal *electric* service (and thereby subsidizing several or all of the municipal services being rendered to the actual inhabitants of such municipalities). Indeed, the condition is not exacted from only newly locating customers; it may be pursued for the purpose of "pirating" the business of customers already being served by cooperatives or investor-owned utility companies.

In many instances, the power companies, and even in some instances the cooperatives, are the franchised electric suppliers in municipalities which do not own or operate their own electric systems. Both of these types of entities, however, inevitably are at a severe competitive disadvantage when the onerous practice of tie-in arrangements is vigorously (and usually clandestinely) pursued against them by municipalities which *do* own and operate their electric distribution systems.

While it may of course be said that tie-in arrangements, pursued by municipalities outside their corporate limits, predictably will inflict damage on both types of entities, that damage, for the purpose of this brief, should nonetheless be differentiated. *Relatively*, the detriment to cooperatives is far greater than to investor-owned companies such as Respondent, for two primary reasons: First, they are either not acquiring, or are actually losing, customers in the *most profitable* areas in which they have pioneered service — without benefit of "just compensation" since no "due process" proceeding is afforded; and second, the resulting suburbanization and, ultimately, urbanization of the affected areas not only comes about sooner but comes about when otherwise it might not come about at all.

This second reason should perhaps be somewhat elaborated: In some states, among them Louisiana, Indiana, and South Carolina annexation brings with it the right of the municipality to expropriate power company as well as cooperative "going concern" facilities. (*See* LA. Revised Statutes, Title 19, section 101 *et seq.*, and *City of Thibodeaux* v. *Louisiana Power & Light Co.*, 373 F.2d 870; Bunn's Indiana Statutes, 1970 Supp., §55-4418A and *City of Greenville* v. *Hancock County REMC*, 277 N.E.2d 799, 1971; and South Carolina Code of Laws, §24-76.)

Cooperatives and power companies alike (as well as their respectively served publics) stand in similar shoes when municipal electric systems, furnishing a purely proprietary, private-type service, put them to competitive disadvantage by conduct proscribed under the Sherman and Clayton Acts, *infra*. Cooperatives are unique in both the kind and degree of adverse consequences they must thereby suffer. Both from the record and from our Motion to file brief *Amici Curiae*, these consequences may surely by this Court be inferred to be of such enormity and pervasiveness as to qualify a different and perhaps even more precious concern for the judicial rectification of municipal tie-in practices than were the issue of interest

solely to the Respondent.

ARGUMENT

I. As to the "Question Presented"

Though arguing as *Amici Curiae*, we respectfully take issue with the wording of the "Question Presented" as stated by the Petitioners. We think the question presented is simply whether a political subdivision of a state, operating an electric system in retail market competition with investor-owned electric utilities and electric cooperatives, is subject to the Sherman and Clayton Acts. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1 and 2; and 33 Stat. 730 (1914), as amended, 15 U.S.C. §14. We respectfully argue that the question as stated by the Petitioners intimates an umbrella issue of law which, in its ultimate implications, could bring to question whether a city's monopoly of a police force could subject it to antitrust liability. We do not believe that anyone associated with any aspect of this proceeding considers that there is the remotest possibility that the Sherman and Clayton Acts could or should be so construed.

II. Adoption of the Respondent's Brief

We read thoroughly the briefs submitted at the various stages of this proceeding in the Fifth Circuit Court of Appeals. In anticipation, and indeed upon the assumption, that the briefs filed by the Respondent at the Fifth Circuit level will be substantially repeated in this Court, we hereby adopt Respondent's brief accordingly, except as qualified and supplemented following.

III. Qualified and Supplemental Argument

A. The cases already decided by this Court having a bearing on the question here presented are both consistent and consonant with the judgment and instruction rendered by the Fifth Circuit Court of Appeals in this case.

Petitioners sought dismissal of Respondent's counterclaim

alleging acts by Petitioners which would be violative of certain sections of the Sherman and Clayton Acts, on the theory that they, being arms of the State of Louisiana, are immune to those Acts. The primary cases in this Court bearing on this issue are: *Parker* v. *Brown*, 317 U.S. 341 (1943); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); and *Cantor* v. *Detroit Edison Company*, 428 U.S. 579 (1976).

We believe there is a fairly simple syllogism which reconciles not only all three of those cases, but the instant case with them:

First, *Parker* did not reach far enough to immunize the particular activities complained of by the Respondent. *Parker* said:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officials or agents from activities directed by its Legislature.
>
> * * * *
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it also intended to restrain state action *or official action directed by a state*." (Emphases supplied).

Parker addressed itself to *state* or *state*-directed action.

The Fifth Circuit in the instant proceeding ruled that the District Court should proceed further by way of inquiry as to whether the State of Louisiana had specifically authorized or directed the Petitioner Cities to participate in the type of antitrust conduct alleged. Presumably, if such an inquiry were to determine that the State of Louisiana *had* so intended, the Respondent's counterclaim must fall. Lacking such a determination, its counterclaim must be tried to the merits.

Second, in *Goldfarb*, this Honorable Court, citing *Parker*, said:

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity *is required by the State acting as sovereign*. Here we need not *inquire* further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." (Emphases supplied; case citations omitted).

Goldfarb is wholly consistent and consonant with *Parker*, and indeed, like the Fifth Circuit in the instant case, recognizes that the question of immunity from Sherman and Clayton requires first a "threshold inquiry" as to whether the challenged activity "is required by the State acting as sovereign."

Farther on in *Goldfarb*, this Honorable Court said:

> "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." (Footnotes and citations omitted).

The analogy, it seems to us, is complete and unblemished: A group of citizens acting under the would-be shield of a municipal corporation, commit, for inurement to their own private constituency benefit, an act which is "essentially a private anticompetitive activity." That, purely and simply, is what the Petitioners allegedly do, and especially if they do it through a tie-in arrangement.

Third, *Cantor*, which was decided only last year, not only relies upon *Goldfarb* and *Parker* and cites them with approval, but supports the rationale of the Respondents in the instant

case in treating with a purely competitive, commercial activity by a regulated investor-owned utility. The rationale, it seems to us, is impenetrable and by this Court should be wholly accepted and affirmed:

> "Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy. Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards." (Footnotes omitted.)

B. Congressional enactments with respect to antitrust activity, as well as other holdings of the courts, since enactment of the Sherman and Clayton Acts, are wholly consistent and consonant with the order and instruction of the Fifth Circuit in this case.

The Sherman Act was enacted in 1890, and the Clayton Act was enacted in 1914. Petitioners make much of the fact that Congress neither expressed specifically that states or their subdivisions would be subject to those Acts nor, since their enactment, has amended them to that effect. We submit that, while that may be true, it is no indication that those Acts are not to be applied where the activity complained of is of a

purely private nature and particularly when that activity has not been *required* by the state itself in the exercise of its *sovereign* powers. Shoring up that concept are numerous acts of Congress as well as court decisions. Consider:

— — FPC must pay heed to antitrust allegation of price squeeze and can give relief therefor in the level of the rate of return that is allowed. *Conway Corporation, et al.* v. *Federal Power Commission*, 510 F.2d 1264 (1975) and *Federal Power Commission* v. *Conway Corporation*, 96 S.Ct. 1999 (1976).

— — FPC not only must heed but it has authority to give relief with respect to other forms of antitrust conduct. *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Gulf States Utilities Company* v. *FPC*, 15 PUR 4th (1976).

— — Antitrust conduct is also forbidden by §10 (h) of Part I of the Federal Power Act. Part I of the Federal Power Act, 16 U.S.C.A. §§791-823. While preference for initial hydroelectric licensing is accorded states and municipals, the Act does not exclude them from application of §10 (h). Part I of the Act was enacted (1920) *after* both Sherman and Clayton, but *before Parker* was handed down.

— — The Federal Power Commission has authority under Part I of the Federal Power Act to require, as a condition of licensing, that the licensee will interconnect with and wheel power for Federal power systems. Part I of the Federal Power Act, 16 U.S.C.A. §§791-823; *FPC* v. *Idaho Power Company*, 344 U.S. 17. It can also insert other conditions to prohibit anticompetitive conduct. *Municipal Electric Association of Massachusetts, et al.* v. *Federal Power Commission*, 414 F.2d, 1206; *Re New England Power Company*, 83 PUR 3d 103.

— — The Federal courts represent a forum for direct relief

from anticompetitive conduct of public utilities, and these tribunals can grant such relief totally, notwithstanding the fact that partial relief could be granted by FPC. *Otter Tail Power Company* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed 359 (1973).

— — The Nuclear Regulatory Commission ("NRC," formerly the Atomic Energy Commission) also has the power and responsibility of so conditioning the issuance of licenses for nuclear power plants as to avoid or correct licensee activities inconsistent with the nation's antitrust laws and policies. National Atomic Energy Commission Act of 1954, as amended, 42 U.S.C.A. §2011 *et seq*. The Act not only does not exempt municipalities from these provisions; it apparently conceives them to be covered by Sherman and Clayton. *See* §2135(a) of the Act.

— — The NRC powers in this respect are such that they may require licensees to permit partial ownership of licensed nuclear facilities, and to provide wheeling, pooling, etc. *Toledo Edison Company, Cleveland Electric Illuminating Company*, Docket Nos. 50-346A, 50-500A, 50-501A, 50-440A and 50-441A, January 6, 1977.

From the foregoing one may easily surmise that Congressional intent with respect to Sherman and Clayton applicability to municipalities, while not out of harmony with *Parker*, is certainly *in* harmony with *Goldfarb*, *Cantor* and the Fifth Circuit's decision in this case.

IV. Legislative Mandate Test Not Only Would Not Offend Public Policies; It Would Affirm Public Policy As Evolved in Virtually All of the States Since Sherman and Clayton Were Enacted.

The Petitioners' most appealing but least logical argument is that, for a number of reasons, the "trier of fact" in determining whether the State of Louisiana intended for its municipalities to engage in the alleged antitrust activities "would have the

difficult job of determining whether 'the legislature contemplated the kind of action complained of' ". (Petitioners' Brief, p. 15). They augment their argument of "difficulty" by stating, on page 16 of their Brief, that, when they themselves act, "Government itself is the actor." In this latter argument they are palpably mistaken. While the Petitioners are creatures of the State of Louisiana, *they are not the State itself*. Petitioners even argue that the "age of many charters and the almost total lack of published legislative history available at the state level" is a reason to reverse the Fifth Circuit. *See* Petitioners' Brief at p. 19. They even tempt the Federal Courts to avoid "the burden of second guessing the purposes of state legislatures with little or no objective guidance from any source," (Petitioners' Brief, p. 20; footnote omitted); and they finally urge that to rule with the Respondent will be to impose great apprehensions and thus inhibitions on municipal decision-making because municipal officials no doubt will be fearful of both monetary and criminal sanctions.

A final argument of the Petitioners, at page 23 of their Brief, is that they "exist to carry out the popular will and are managed by officials subject to removal from office should the discharge of their duties not conform to the will and expectations of the electorate." *Query*: Would the inhabitant voters inside the corporate limits of the Petitioners be likely to censure their officials and re-call or fail to re-elect them for the reason that the anticompetitive conduct of the Petitioners' electric business *outside* town is bringing in revenues to subsidize all manner of municipal services *inside* town?

We respectfully argue that these fears not only are groundless and without merit, but that they reflect what is perhaps a more authentic concern of the Petitioners—that being that the judicial inquiry which the Fifth Circuit has ordered will, predictably and indeed, elicit a large volume of evidence *which shows without question that the State of Louisiana not only did not intend for its municipalities to deport themselves as here complained of, but quite the contrary*. The same may be

said with respect to every state in the nation. Consider:

— — Every state in the Union, including now even the states of Minnesota and Texas, have established regulatory agencies one of whose major purposes is to substitute regulation and service area assignments for wasteful competition resulting from duplication of services and facilities.

— — Certainly this is true of Louisiana. Although it already had a regulatory scheme for its investor-owned power companies, it also brought substantially under that scheme the electric cooperatives of that state just a few years ago. La. Revised Statutes, Title 45, §123.

— — With respect to the operation of municipal electric systems outside their corporate limits, the Louisiana Public Service Commission has held that the municipalities are indeed subject to the jurisdiction of that Commission. *Louisiana Power and Light Company* v. *City of Monroe and the City of Monroe Utilities Commission*, Order No. U-12654, Docket No. U-12654, February 5, 1975.

This Court should recognize the apparently (but not real) paradoxical relationship between the foregoing Louisiana developments and the facts that obtained in *Cantor*. Investor-owned companies, cooperatives and municipal electric systems are, to one extent or another, brought under regulation, particularly territorial (or competitive) regulation, in the State of Louisiana—as indeed is the case in most states with respect to power companies and Cooperatives. In the exercise of its regulatory powers, the State of Louisiana has thus said to its investor-owned, Cooperative and municipal jurisdictional utilities that wasteful duplication of services and facilities will not be tolerated—such wasteful duplication being a predictable by-product of "buying" electric customers by "baiting" them with other types of utility service *otherwise withheld* even though facilities capable of electrically serving them, owned by

others, are already in place and operation. The avoidance of such duplication has been mandated by La. Statutes, Title 45, §123. On the other hand, in *Cantor*, even though the State of Michigan through its public service commission had given its approval to the policy of furnishing light bulbs and financing the same through the utility's rates, this Court, and rightfully, denied the utility of state-derived immunity for the reason that that utility as Petitioners no doubt did here, asserted the *initiative* in the anticompetitive practice, and it was a practice of a purely *private* nature, certainly not the positive, sovereign action of the State.

No. It is not the fear of having to go through a maize of hearings with difficult problems of evidentiary proofs, or the resulting lack of courage and forthrightness on the part of the Cities' officials, that impels the Petitioners' emotional appeal in the latter portion of their Brief; it is, in all probability, their understandable expectation that the ordered inquiry will indeed elicit a wealth of information totally and utterly opposed to the position they take.

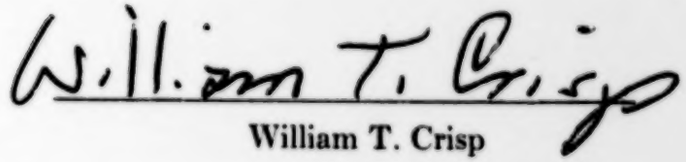
One final word needs to be said in this respect. The doctrine of *Parker*, as interpreted and applied by *Goldfarb*, *Cantor* and the Fifth Circuit in this instant case, while amply protective of *truly state-required activities in the exercise of sovereign power*, is not so tunnel visioned, is not so 12-gauge shotgunned, is not so unreasonable—as to permit nonrestrainable and nonredressable municipal conduct, acting in a purely private-type and proprietary operation, which imposes upon its truly private counterpart competitors the evils proscribed by Sherman and Clayton. Both logic and judicial restraint, reflected in all of the above referred-to decisions, should put to rest the fears of any who predict an illogical and destructive assault upon all state action of whatever kind.

CONCLUSION

For all of the foregoing reasons, the judgment of the Fifth Circuit should be Affirmed.

Respectfully submitted.

CRISP, BOLCH, SMITH, CLIFTON & DAVIS



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June 15, 1977

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APPENDIX "A"

Amici Curiae and Pertinent Related Information

National Rural Electric Cooperative Association, ("NRECA") 2000 Florida Avenue, N.W., Washington, D.C., 20009. NRECA is the national trade-service association of its approximately 1,000 members, which are comprised preponderantly of rural electric distribution cooperatives but also of bulk power supply cooperatives, statewide trade-service associations of electric cooperatives and other related types of entities. (All of the additional Amici Curiae listed following are members of NRECA.)

Association of Illinois Electric Cooperatives, ("AIEC") 6460 South Sixth Frontage Road, Springfield, Illinois, 62708. AIEC is the statewide trade-service association of all of the 28 distribution electric cooperatives as well as the two power supply electric cooperatives corporately sited and operating in that state.

Association of Louisiana Electric Cooperatives, Inc., ("ALEC") 10725 Airline Highway, Baton Rouge, Louisiana, 70816. ALEC is the statewide trade-service association of 13 of the 14 distribution electric cooperatives and the one power supply electric cooperative corporately sited and operating in that state.

Fairfield Electric Cooperative, ("Fairfield") P. O. Box 150, Winnsboro, South Carolina, 29180. Fairfield is a distribution electric cooperative corporately sited and operating in the State of South Carolina. It is a member of SCECA and NRECA.

Georgia Electric Membership Corporation, ("GEMC") 148 Cain Street, Suite 845, N.E., Atlanta, Georgia, 30303. GEMC in the statewide trade-service association of all of the 42 distribution electric cooperatives corporately sited and operating in that state.

North Carolina Electric Membership Corporation, ("NCEMC") 3333 North Boulevard, Raleigh, North Carolina, 27611. NCEMC is the statewide trade-service association and power

supply agent of all of the 28 distribution electric cooperatives corporately sited and operating in that state.

Oklahoma Association of Electric Cooperatives, Inc., ("OAEC") 2325 N.E. Expressway, Oklahoma City, Oklahoma, 73111. OAEC is the statewide trade-service association of all 27 of the distribution electric cooperatives and of the two power supply electric cooperatives operating in the State of Oklahoma, all but one of which (Arkansas Valley Electric Cooperative, Ozark, Arkansas) are corporately sited in that state.

South Carolina Electric Cooperative Association, Inc., ("SCECA") 808 Knox-Abbott Drive, Cayce, South Carolina, 29033. SCECA is the statewide trade-service association of 17 of the 18 distribution electric cooperatives and of the two power supply electric cooperatives corporately sited and operating in that state.

Sioux Valley Empire Electric Association, ("Sioux Valley") Colman, South Dakota, 57017. Sioux Valley is a distribution electric cooperative corporately sited and operating in the State of South Dakota.

Texas Electric Cooperatives, Inc., ("TEC") 8140 Burnet Road, Austin, Texas, 78766. TEC is the statewide trade-service association of 78 distribution electric cooperatives and two power supply electric cooperatives corporately sited and operating in that state.

Virginia Association of Electric Cooperatives, ("VAEC") 5601 Chamberlayne Road, Richmond, Virginia, 23227. VAEC is the statewide trade-service association of all of the 15 distribution electric cooperatives corporately sited and operating in the State of Virginia, of both of the distribution electric cooperatives corporately sited and operating in the State of Maryland, and of the one distribution electric cooperative corporately sited and operating in the State of Delaware.

APPENDIX "B"

State Legislation Affecting Electric Cooperative Territorial Rights, Including Areas Annexed by Municipalities, Enacted Since January, 1970.

FLORIDA	Florida Stat. Annotated §366.04
GEORGIA	34B Ga. Stat. Annotated §301 *et seq.*
LOUISIANA	L.S.A.-R.S. §45;123
MINNESOTA	Minn. Stat. §216B.37
MONTANA	Montana Revised Codes Annotated, Title 70, §501 *et seq.*
OKLAHOMA	17 Oklahoma Stat. Annotated §189
PENNSYLVANIA	Penn. Stat. Annotated (Purdon) Title 15 §3277 *et seq.*
SOUTH DAKOTA	SDCL §49-34A-42 *et seq.*
TEXAS	Title 32 Tex. Civ. Stat. 1446C §49 *et seq.*

CERTIFICATE

I hereby certify that two copies of the foregoing ~~Motion~~ Brief have been served on counsel of record for all parties to this proceeding by placing the same in the United States mail, postage prepaid, this 15th day of June, 1977.

William T. Crisp

William T. Crisp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA, AND
CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*,
v.
LOUISIANA POWER & LIGHT COMPANY, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY UTILITIES COMPANY, NEW ENGLAND POWER COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, PUBLIC SERVICE COMPANY OF INDIANA, INC., AND SOUTHERN CALIFORNIA EDISON COMPANY SUPPORTING RESPONDENT LOUISIANA POWER AND LIGHT COMPANY

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June 15, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

MOTION OF COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY UTILITIES COMPANY, NEW ENGLAND POWER COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, PUBLIC SERVICE COMPANY OF INDIANA, INC., AND SOUTHERN CALIFORNIA EDISON COMPANY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE SUPPORTING RESPONDENT LOUISIANA POWER AND LIGHT COMPANY

Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Kentucky Utilities Company, New England Power Company, Pacific Gas and Electric Company, Public Service Company of Indiana, Inc., and Southern California Edison Company ("the Companies") ask this Court for leave

to file the attached brief *amicus curiae* supporting the position of respondent Louisiana Power and Light Company. Counsel for respondent and for petitioners have not consented to the filing of this brief.

The Companies, either directly or through their subsidiaries or affiliates, own and operate systems for generation, transmission and distribution of electric power, subject to regulation by the states in which they operate and by the Federal Power Commission. Electric utilities have been held to be subject to the federal antitrust laws. See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973). Federal antitrust policies are considered under section 105(c) of the Atomic Energy Act of 1954, as amended,[1] and under the Federal Power Act.[2]

The issue here is whether, in operating their municipal electric utility businesses, the petitioning municipalities are automatically beyond the reach of the federal antitrust laws. The resolution of this issue will have an effect far beyond its impact on two Louisiana municipalities. In the United States some 1750 municipalities are engaged in the electric utility business, including such major cities as Los Angeles, California; Seattle, Washington; Memphis, Tennessee; Jacksonville, Florida; and San Antonio, Texas. If municipally owned electric systems are unrestrained by the federal antitrust laws from engaging in anticompetitive activities, such as those described in the counterclaim in this proceding, the Companies, other investor-owned utilities, and the public will be ad-

[1] 42 U.S.C. § 2135.

[2] *E.g., Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973).

versely affected. The Companies therefore believe that it is important for the Court to hear their views.

Respectfully submitted,

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QUESTION PRESENTED

Can a municipality engaging in anticompetitive practices in connection with its electric utility business escape the reach of the federal antitrust laws simply because of its status as a municipality?

ARGUMENT

I. A Municipality Engaging in Anticompetitive Practices in Connection With Its Electric Utility Business Cannot Escape the Reach of the Federal Antitrust Laws Simply Because of Its Status as a Municipality.

The petitioning Cities' position is, starkly, that insofar as the federal antitrust laws are concerned, if a municipality does it, it is legal. They rely, of course, on the holding of *Parker* v. *Brown*[1] that the Sherman Act did not undertake to restrain the state acting as sovereign. By substituting "municipality" for the "state acting as sovereign" the Cities easily reach their desired result. The substitution, however, is not so easily made.

The state, like other incorporeal entities, must act through agents and may indeed act through incorporeal agents, such as municipalities, which in turn act through their agents. To make *Parker* effective, therefore, requires that the agents which carry out the state's directions be insulated from the federal antitrust laws. It does not follow, however, that *all* official acts of *all* state agents or agencies are insulated from federal antitrust scrutiny.

A unanimous Court in *Goldfarb*[2] clearly held that *some* acts of state agencies are subject to federal antitrust laws. Relying on *Parker,* the Court carefully distinguished between those state actions which are

[1] 317 U.S. 341 (1943).

[2] *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), where the Court considered whether the establishment of a minimum fee schedule by the Fairfax County Bar Association and its enforcement by a state agency, the Virginia State Bar, violated the federal antitrust laws.

and those which are not subject to the federal antitrust laws, finding exempt only those state actions required by the "state acting as sovereign";

> The *threshold* inquiry in determining if an anticompetitive activity is *state action of the type* the Sherman Act was meant to proscribe is whether the activity is *required by the State acting as sovereign. Parker* v. *Brown* . . . . It is not enough that . . . anticompetitive conduct is prompted by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as sovereign.* 421 U.S. at 791-792 (emphasis added).

The important point is that both *Parker* and *Goldfarb* frame this issue in terms of the nature of the activity and the extent of its authorization by the state as sovereign, not in terms of bare status as argued by Cities. Cities' position is that all activities of certain state agencies, i.e., municipalities, are subject to the federal antitrust laws. Thus, in their view, municipalities escape from any need for the *Goldfarb* analysis as to whether the state as sovereign required their questioned activities.

Cities would distinguish *Goldfarb* because the Virginia State Bar was a "state agency for some limited purposes" (421 U.S. at 792), whereas municipalities, they say, are "wholly governmental" (Br. 5). But this is a distinction without a difference. Though municipalities are governmental bodies, they have only those powers delegated to them under the laws of their state. They make municipal policy, within appropriate limitations, but clearly, in so doing they are not making state policy of the type contemplated in *Parker.* Their argument that they are exempt from

federal antitrust laws, without regard to state policy and without inquiry into whether they are carrying out a direction of the state as sovereign, cannot be squared with the *Parker* and *Goldfarb* approaches.

Cities also would distinguish *Goldfarb* because it involved voluntary action in the pecuniary interests of the State Bar members. In their electric business, however, Cities are engaged in a proprietary function. As the district court below found: "the Cities are engaging in what is clearly a business activity: activity in which they earn a profit". (App. 49). Moreover, the anticompetitive activities Cities allegedly engaged in are "voluntary" in the same sense as the activities of the State Bar: that is, they represented deliberate choices among courses of conduct, choices which were not required by the state. But Cities would foreclose any examination of this parallel to *Goldfarb* simply by invoking their status as municipalities.

The Cities attempted distinction of *Goldfarb* comes down to their assertion that "the State Bar's activity was not state action". (Br. 11). But what the Court actually decided was that the State Bar's activity was not the *type* of state action covered by *Parker*. It could hardly have done otherwise. Obviously, *Parker* does not exempt all state action. Its references to "legislative command of the state", "activities directed by its legislature", and its conclusion that

> *The state in adopting and enforcing the prorate program* made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the*

> *Sherman Act did not undertake to prohibit.* (317 U.S. at 350-352, emphasis added).

are clear and positive indications that only certain types of state actions are exempt.

This Court's subsequent opinions in *Cantor* v. *Detroit Edison Co.*[3] do not help Cities' case. There, Detroit Edison's tying of light bulb sales to electric utility service was held to be action by the Company and not action of the state agency itself. The fundamental question was how far *beyond* state agency activities the *Parker* principle should apply. The plurality opinion noted that the *Parker* decision was "narrow" and described it as applicable to "action taken by state officials *pursuant to express legislative command*" (428 U.S. at 589, emphasis supplied), clearly implying that action of state officials not so taken is not within the *Parker* holdings. Furthermore, in considering whether the fact that Detroit Edison was operating under a general state regulatory scheme brought the Company within the *Parker* rule, five members of the Court agreed that it did not, absent an explicit state direction to its regulatory agency.

In short, the *Cantor* analysis parallels that of *Parker* and *Goldfarb*, confirming that the availability of the state action antitrust exemption depends on the nature of the action and its place in state policy, rather than on the mere identity of the actor.[4]

---

[3] 428 U.S. 579 (1976).

[4] Since *Goldfarb*, three Circuit Courts of Appeal have unanimously rejected the simplistic state action test Cities press here: the Fifth Circuit in the case below, the Third Circuit in *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (1975) and the Seventh Circuit

II. The *Parker* Exemption Should Be Strictly Construed in Its Application to Anticompetitive Practices of a Municipality in Its Proprietary Conduct of an Electric Utility Business.

A majority in *Cantor* endorsed a severe test for determining whether regulatory policy is a basis for exemption from federal antitrust laws under *Parker:*

> The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.
>
> The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, "and even then only to the minimum extent necessary". 428 U.S. at 596-597 (footnotes deleted).

This strict test limits exemptions from the federal antitrust laws even though regulatory controls would still apply to the action exempted. A similar test should be applied even more strictly where, as here, the state does not purport to regulate at all but merely authorizes the participation of subordinate state agencies in commercial enterprises. There should be no implied exemption without first determining that it is necessary to implement some policy of the state acting as sovereign.

---

in *Kurek* v. *Pleasure Driveway and Park District of Peoria,* No. 76-1791, May 26, 1977 where the court said:

> *Cantor* and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. Slip. Op. at 11.

Particularly, when the state authorizes a municipality to engage in a business enterprise it does not thereby establish that it is state policy that the municipality have a blanket exemption from federal antitrust law. True, a municipal electric utility may have monopolistic aspects, as does every electric utility operation, regardless of ownership, but this need not and does not carry with it exemption from all the requirements of antitrust law.

The purpose of *Parker* is served by looking to the policy which the state establishes for its subordinate agencies and excluding federal antitrust law interference with those policies. Nothing more is necessary to give the states the freedom which *Parker* found Congress intended.

As *Parker, Goldfarb* and *Cantor* make clear, state policy is to be determined by looking to its sovereign action, essentially the pronouncements of its legislature. Mere neutrality on the part of state law did not suffice to exempt the light bulb tie-in in *Cantor;* no more should it suffice here to exempt the Cities' anticompetitive conduct.

Cities try to avoid the fact that they are engaged in a business activity by decrying the governmental-proprietary distinction, citing pre-*Goldfarb* cases in the courts of appeal and this Court in *Indian Towing Company* v. *United States,* 350 U.S. 61 (1955). In the

latter case the Court declined to find an immunity from damages (resulting from failure of a lighthouse beacon) by applying the distinction. More recently, in *Dunhill* v. *Cuba,* 48 L.Ed. 2d 301 (1976) four members of this Court relied upon the distinction between governmental acts of a foreign state and its private and commercial acts, quoting the following from Chief Justice Marshall in *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat 904, at 907, 6 L.Ed. 244 (1924):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

The distinction between governmental and proprietary activities of a governmental body arose as a limitation on the sovereign immunity of governments from suit. In general, the erosion of the distinction has been in the direction of reducing governmental immunity so that it is really the immunity, and not the distinction, which has been discredited. Cities push in the other direction, hoping to give their business activity a blanket exemption because it is owned by a governmental agency. Where the proprietary nature of the enterprise is clear cut, however, as in the operation of an electric utility business, it represents a factual distinction which certainly should be taken into account by the Court in applying *Parker.* In particular, a proprietary activity should be subjected to stricter tests, pursuant to *Cantor* principles, than a governmental activity.

III. It Is in the Public Interest to Restrain Anticompetitive Practices of a Municipality Which Have Not Been Directed by Sovereign State Action.

In an endeavor to maintain their position of complete exemption from federal antitrust law Cities argue that public policy reasons require such a result. They say that because they "function solely in the public interest", an "analysis of any legislative mandate to engage in particular anticompetitive acts is *unnecessary*" (Br. 18, emphasis added). This argues that anticompetitive activities are in the public interest whenever undertaken by a city.

An assumption that the motives of the municipalities are public spirited does not serve to bring them within *Parker* for at least two reasons. First, the rationale for the *Parker* interpretation of the Sherman Act was that federal antitrust restraints were not intended to be placed on explicit state policies. The reason for confining the exemption to explicit state policies is clear. Because even the most public spirited officials in political office frequently differ as to what is in the public interest, it is entirely reasonable to exempt the implementation of only those policies which have been explicitly adopted by the state and not of every policy deemed by a state or municipal official, however high-minded, to be in the public interest.

Secondly, the public interest of a municipality is not necessarily equivalent to the public interest of

the state as a whole. Conflicts between state and municipal officials as to public policy are aired in the press and news media almost daily, often representing the differences between local interests and those with a regional or state wide aspect.[5] Yet *Parker* was concerned only with protecting state freedom to act as contrasted with the diverse actions which might be taken by undirected local state agencies.

Cities, of course, point to no state policy from above which contemplates the anticompetitive activities complained of and, in fact, there could be a statewide policy to the contrary. Their position is that inquiry into such matters is irrelevant and that whatever a municipality does is in the "public interest" and therefore state policy for *Parker* purposes. This would extend exemption from national antitrust policy far beyond anything contemplated in *Parker* and take an approach contrary to *Goldfarb* and *Cantor*.

Cities recite problems and "disruptions" which would result if they are potentially liable under the federal antitrust laws. These are the same problems

[5] Drawing on an argument in the pre-*Goldfarb* opinion of the Ninth Circuit in *State of New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974), Cities argue that since their officials are subject to removal by popular vote, should their performance "not conform to the will and expectation of the electorate" the antitrust laws are "neither necessary nor appropriate to prevent transgressions by local public authorities" (Br. 23). The Ninth Circuit, however, in discussing the subject as it related to state government, said: "where a state's activities affect the economy of another state, to whose citizens it is not responsible politically, the activity must be carried out within the confines of the Interstate Commerce Clause" (501 F.2d at 367, n. 8, last paragraph). In other words, electoral control cannot be counted upon to protect the public interest outside of the electoral boundaries. By the same token, municipal electoral views should not be taken as representative of state policy.

which non-municipal electric utilities must accept and face, as *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973); *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973); and *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976) indicate. Cities, in "engaging in what is clearly a business activity: activity in which a profit is realized", as the district court below found, should be equally capable of coping with the universal problems of complying with the law. This Court found in *Cantor* that the uncertainties of the Sherman Act and the exposure to treble damage liabilities did not call for exemption, even when the electric utility's tariff covering the bulb exchange program had been approved by the state regulatory commission. Cities have shown no justification for more lenient treatment of liability for anticompetitive conduct of a municipal electric utility, if proven.

Cities express concern that potential antitrust liability would have a "chilling effect" on their decision making. But such deterrence from predatory anticompetitive practices is precisely the purpose of the antitrust laws.

In the same vein, Cities argue that their simplistic interpretation is easier for the courts to apply. This has already been answered in *Cantor* where a simple rule of relying upon state regulatory approval was urged upon the Court. Mr. Justice Stevens responded that under such a rule:

> No matter what the impact of the proposal on interstate commerce, and no matter how peripheral or casual the State's interests may be in permitting it to go into effect, the state act would confer immunity from treble damage liability. Such a rule is supported by the wholesome interest in

> simplicity in the regulation of a complex economy. In our judgment, however, that interest is heavily outweighed by the fact that such a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest. (428 U.S. at 603).

This language points out very clearly the danger to the public interest in giving a subordinate state agency *carte blanche* to override antitrust laws. These dangers are likewise present when the state agency is a municipality, especially when engaged in a business activity.

CONCLUSION

The interpretation which this Court gave to the Sherman Act in *Parker* has its foundation in the federal nature of our Republic as a Union of States, an implicit factor to be taken into account in ascertaining the intention of Congress. Cities' position would not only preserve the freedom of 50 states to legislate without regard to the federal antitrust laws, but would give the same liberty to every municipality—there are over 18,000 in the United States—limited only by the scope of its delegated powers. The effect would be to treat the Union as a federation of municipalities, not of states, which is scarcely likely to represent the intention of Congress.

Parker, Goldfarb and *Cantor* have gone no further than to recognize an exemption from federal antitrust laws where the action implements directions of the state acting as sovereign. Cities' test is purely mechanical: the antitrust inquiry ends upon a finding that the action was by a municipality.

These *amici curiae* urge this Court not to so enlarge opportunities to engage in anticompetitive conduct forbidden by the federal antitrust laws.

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